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# COPYRIGHT IN CANADA

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# PROPOSALS FOR A REVISION OF THE LAW

By  
**A. A. Keyes and C. Brunet**



Consumer and  
Corporate Affairs Canada

Consommation  
et Corporations Canada

APRIL 1977



COPYRIGHT IN CANADA  
PROPOSALS  
FOR A REVISION OF THE LAW



Consumer and  
Corporate Affairs Canada

Consommation  
et Corporations Canada

APRIL 1977



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The Honourable Anthony C Abbott  
Minister of Consumer and Corporate  
Affairs Canada  
Hull, Quebec

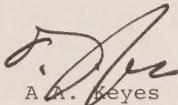
Dear Mr. Abbott:

We have the honour to transmit to you a study entitled Copyright in Canada: Proposals For a Revision of The Law.

This study follows other papers in the field of intellectual property, those on Trade Mark Law published in February 1974, and on Patent Law published in June 1976.

The purpose of this study is to expose for public discussion the proposals made to revise the law respecting copyright. On the basis of that discussion, it is anticipated that the preparation of new legislation for modernizing Canada's copyright law can proceed with a better understanding of this the most complex field of intellectual property law.

Yours sincerely,

  
A.A. Keyes

  
C. Brunet

#### ACKNOWLEDGEMENT

This paper is the result of research, analysis of many briefs, and of consultation and discussions with interested persons and organizations, in both the private and public sectors. Parts 1, 3 and 4 are our work, Part 2 is the work of Fenton Hay, of the Bureau of Intellectual Property.

We are grateful for the strong support of those who worked long and hard in typing many drafts and redrafts, and in translating and proofreading. The Paper has benefitted in great measure from the legal editing of Craig Parks, Toronto.

Most of all we are grateful to Mr. A.M. Laidlaw, former Assistant Deputy Minister and Commissioner of Patents who gave long hours in listening and questioning. We thank him for his guidance and understanding.

The authors

## PREFACE

In 1971, the estimated contribution of the copyright industries to the gross domestic product was 1.7 billion dollars. Any change in copyright protection could have dramatic effects on the welfare of those industries. Such a change could easily come about by mere failure to revise the law to keep up with new demands arising from technological and social progress. If only for that latter reason, it is safe to say that, more than fifty years after the Canadian Copyright Act was adopted, the time has come for a fresh look at copyright, its rationale, purposes, and the extent of protection it should afford. In this examination the authors have adopted the device of making proposals and recommendations for revision in the format of a Working Paper.

It is unavoidable that the Working Paper will reflect contemporary concerns of a broader philosophical nature. The reader should not be surprised therefore to find constant references to society's newly affirmed needs for instant access to information; neither should he think it unnecessary to examine in detail the new situations created by technological advances. Further, the reader should not summarily reject a stand taken in favour of property rights to which Canadian society still attaches value.

Undoubtedly, there will be those who will disagree with the general approach of this Paper which has made creators' rights its central preoccupation. Yet, it has to be admitted that, almost by definition, a Copyright Act is concerned primarily with creators. In Canada, creators derive copyright protection exclusively from the Copyright Act. It is therefore not inappropriate for this Paper to deal primarily with creators and to define, in terms of limits or exceptions to creators' rights, whatever opposing interests might be recognized. It is certainly fitting that creators' rights be the norm in a revision of copyright legislation, although this is not to say that those rights should know no limits. Thus, the rights of users of copyright material are considered as a derogation from the norm, the latter being the protection of creators.

The Paper recognizes this constraint imposed on any copyright revision process. Another such limit is the fact that it was impossible to envisage, within the restrictions of the Paper, all the possible alternatives to copyright. The authors of the Paper are well aware that it will be essential to consider copyright policy in relation to alternative policy tools, such as grants and subsidies, income tax policy and various other methods. Indeed, royalties as salaries probably function in anything but an equitable manner; the alternative method of government subsidies to authors might, to a certain extent, provide a more balanced situation. However, it was felt that the Paper should not go beyond the elaboration of a logical copyright system for Canada.

It is in this light that the Paper should be read, with the full realization that there may indeed be other government measures more suitable for solving certain problem areas. At the same time, it should be borne in mind that copyright is the recognition of a private property right; it is in those terms that the public purpose of copyright has always been expressed in Canada.

In accordance with this latter view, it can be said that the "public interest", in terms of copyright, encompasses at the same time both the recognition of creators' rights as well as the limits that should be attached to those rights. Identifying exclusively, as has been done, the public interest with the public's "right of access to information" is a bias that should be resisted, in that it would

eventually lead to the demise of the concept of private property in copyright law. As well, it can certainly be said that it is also in the public interest to foster and maintain a healthy cultural milieu; in Canada, such an objective is largely dependent on the recognition of private rights to creators. If, then, the true "public interest" resides in achieving an equitable balance among all the opposing demands for the strengthening or weakening of copyright protection, the central problem in revising copyright legislation is to identify the point where such a balance is reached. This, obviously, is an intensely subjective exercise.

It is therefore of the utmost importance that reactions be made known to the recommendations of this Paper. Indeed, the primary purpose of the Paper is to generate response which, in turn, would help circumscribe an as yet largely undefined public interest.

This Paper, then, is modest in that it recognizes that copyright issues and problems, in large part, are not susceptible to the making of firm recommendations without an extensive dialogue. On the other hand, the Paper does propose that copyright in Canada be looked at under a new light. Especially, a fresh look at copyright should fully take into account a disintegration of certain aspects of international copyright. Examples are found in many States which are tailoring copyright principles to their domestic needs. This Paper offers a number of illustrations of this nationalistic approach to international copyright and suggests that Canada stands to benefit from a more narrow interpretation of its international commitments.

Needless to say, such a position is a controversial one. Those responsible for this Working Paper can only hope that their recommendations will be publicly discussed, so that the copyright system leave the attic in which it has all too easily been confined and that it be submitted to the glare of public scrutiny, as befits a system which has such an impact on the daily lives of all Canadians.

Finally, it remains to be said that the views expressed and the recommendations made are those of the authors alone.

GLOSSARY OF TERMS

Berne (Convention)

Berne Convention for the Protection of Literary and Artistic Works, signed on September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971.

Copyright Act

Revised Statutes of Canada, 1970, Chapter 30.

Economic Council (Report)

Economic Council of Canada, Report on Intellectual and Industrial Property, Information Canada, Ottawa, January, 1971: for details see page 1.

Gregory Committee (Report)

Report of the Copyright Committee (United Kingdom) HMSO, CMD. 8662, 1952: for details see page 12 footnote 2.

Ilsley Commission (Report)

Royal Commission on Patents, Copyright, Trade Marks and Industrial Design: Report on Copyright, Ottawa, 1957: for details see page 6.

UCC

Universal Copyright Convention, signed at Geneva September 6, 1952, revised at Paris, July 24, 1971.

WIPO

World Intellectual Property Organization, Geneva; a specialized agency of the United Nations.

UK Act

Copyright Act, 1956 (4 and 5 Eliz. 2 c. 74).

USA present (1909) law

The copyright law of the United States, Act of March 4, 1909, C320.35 Stat. 1075.

USA new law

The copyright law of the United States, Public Law 94-553: to come into effect January 1, 1978. (formerly Revision Bill S-22).

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## INTRODUCTION

Consumer and Corporate Affairs Canada has the general objective of fostering an efficient Canadian market system. The Department brings together all federal laws regulating business in the market-place, reflecting government policy that a competitive market is the basis for an effective national economy.

Part of the Department's portfolio of legislative responsibility is industrial and intellectual property: patents, trademarks, industrial designs, and copyright. These laws were the subject of a 1971 Report by the Economic Council of Canada<sup>1</sup>, following upon a special reference to the Council by the Federal Government.

Simultaneously with the publication of the Report, the Minister of Consumer and Corporate Affairs Canada announced the formation of a planning group to review the Report and to make recommendations as to new legislation, in each field. This Paper is the result.

The Paper is organized in the following manner: first, the general considerations for revision of the copyright law are examined and principles are proposed; secondly, the economic significance and importance of copyright are explored; thirdly, the general principles of Part I are applied to the detailed subject matter of copyright; fourthly, recommendations are made with respect to certain general considerations, including the necessity of establishing consultative mechanisms. Thus, the Paper seeks to propound a reasonable foundation for the provision of a copyright law, based on certain general principles and their detailed elaboration, with the prime aim of facilitating the law revision process.

The need for consultation was identified at an early stage and informal discussions were held with the public and private sectors. This procedure resulted in the obtaining of freer expressions of views and airing of the issues. The Paper takes into account the <sup>2</sup> briefs, views and submissions made and expressed to the Department.

In addition to its informational function, it is hoped the Paper will stimulate reaction which, in turn, will materially assist the Department in meeting its responsibilities. As this reaction is considered essential to the revision process, addresses where comments may be forwarded are given at the end of the Paper.

### The Function of Copyright

Copyright can be viewed as the legal recognition of creator's rights. That is not to say that creators have been accorded a right of pro-

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1. Economic Council of Canada, Report on Intellectual and Industrial Property, Information Canada, Ottawa, Cat EC 22-1370, January, 1971, hereinafter referred to as the Economic Council Report.
  2. A list of those individuals, organizations, departments and agencies consulted is given in Appendix I.

tection in their creations from the time that the first author concerned himself with story telling. Only through time have certain rights been established by various civilizations, usually as an expression of moral imperative.

In most countries it is generally accepted that creators are entitled to a degree of protection for their work, on the grounds that a creator should benefit from the fruits of his labour. If creators are guaranteed a minimum of protection, they will be encouraged to create new works, thereby enriching the cultural life and fabric of the country and adding to the store of information.

A further reason for protection is one resting on moral grounds, the basis of which is that a creative work is the expression of the author's personality, and that it is the creator who should have the right to insist that his work be respected, and to decide whether, when, and how his work may be reproduced or performed in public.

#### Conflicting Goals

In arriving at recommendations for revision of the Copyright Act, basic conflicting objectives have to be reconciled. On the one hand some believe that the copyright law should be a force to help shape the cultural life of a society. On the other hand it has been said that the control given to a creator over his work should be absolute. The present law in fact limits the rights of an author, particularly in time. That copyright law makes works widely available only because it brings to authors a mandatory return may be true. It is certainly true that the works of creators will not be the subject of mass production and distribution if entrepreneurs cannot be assured of realizing a reasonable return.

The problem therefore lies in finding the proper equilibrium which allows a creator to pursue his rights, and to benefit from the use of his works, but which also assures the entrepreneur reasonable returns. This Paper is devoted to a consideration of how this balance may be achieved within the public interest.

#### Plan of the Paper

The Paper consists of four parts and a conclusion: Part I deals with defining the nature and rationale of copyright, the reasons for, and the problems of revision, and the particular constraints imposed upon freedom of choice in recommending revision of the law. Part II sets forth the relevant data in respect of the economic importance of copyright and discusses the economic significance of copyright. Part III examines the particulars of a copyright law, by defining issues and making recommendations for the solution of these issues. Part IV deals with administrative matters which arise, in part, from the recommendations of Part III. The conclusion makes general summarizing recommendations.

#### PART I

This part identifies and discusses the general bases for revising the copyright law. The nature of copyright and its rationale and origins are summarily discussed, followed by a consideration of the Canadian experience with copyright law, and of reports of various bodies charged with looking into revision of the law. There is a discussion of the reasons for revision, and of the problems and the constraining factors affecting revision. This Part also seeks to describe the

present situation in such a way as to relate the system and its characteristics to certain derived general principles upon which the recommendations for revision are made in Part III.

#### A BACKGROUND TO COPYRIGHT

##### 1. Nature of Copyright

Copyright, essentially, is the exclusive right to do certain acts in relation to protected matter. Copyright law is the legal expression of the rights granted by Parliament to a creator to protect his work against a variety of unauthorized possible uses. In Canada, copyright arises without formalities, automatically, when a work is created by a Canadian citizen or by a national of one of those countries with which Canada has international agreements.<sup>1</sup>

Though copyright is expressed in terms of property, it is not directly analogous to industrial property (patents, trademarks and industrial designs), where the major concern is with the circulation of goods that have economic value apart from their intellectual content. As it deals with purely intellectual matter, copyright can never interfere with a person's physical well-being.

Furthermore, unlike patents, copyright does not prevent others from using or copying ideas embodied in the protected work. In copyright, anyone is free to use the information, ideas, and facts contained in a particular work. Moreover, independent creation of the same or of a similar work is not prohibited, as long as there is no copying of the author's "expression". (Protection goes to the work itself and not to the ideas contained in the work. Copyright does not confer an exclusive right in information and knowledge.)

Finally, it is emphasized that the law does not provide criteria as to the quality or the purpose for which material may have been created. Protection is the same for all protected matter.

Over time, the scope and nature of copyright has changed, more or less following technological developments and contemporary social concepts, in terms of the extent to which authors' rights should be secured. The term "copyright" has been extended to cover not only new rights, but also new subject matter such as motion picture films. To a certain extent, "copyright" in its old sense of "right to reproduce" is now a misnomer: today, many musical and dramatic works primarily acquire value not by means of reproduction of physical copies, but through public performance.

The historical core of copyright was the exclusive reproduction of written works, but it has been reduced in significance by the enormous growth of the mass entertainment and communication industries. (Now the more valuable rights are those to perform in public and to broadcast.)

At the practical and consuming level, copyright law sets the rules under which market forces determine what music is heard, what records are made, what films are seen, what books are published, and what programs are seen on television. The particular item may only be

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1. There are two major international copyright conventions: the Berne Convention and the Universal Copyright Convention. See p 18.

available to the entrepreneur and the consumer on the basis of paying a copyright tribute.

To the extent that it confers exclusivity, copyright provides the author with bargaining power in negotiating contracts to exploit his protected works. Authors know, more or less, of the existence of copyright and that they have rights in their creations. Entrepreneurs are well aware of copyright, as it is the basis upon which they are prepared to take risks in the market. Thus, copyright provides a great part of the legal foundation for the publishing, broadcasting, film, recording and other copyright-related industries.

Also, copyright can be seen in a social sense to provide the means to disseminate information and knowledge which itself encourages further dissemination of ideas. In that sense copyright is an incentive to publish, and that incentive is related to the degree of protection provided by copyright.

## 2. Some Theories of Copyright Law

Where legal theories have been developed, they have, in general, been based on a specific concept of authors' rights.

The English law, from which the Canadian Act is derived, has developed copyright law as a species of property rights, as distinct from personality rights, notwithstanding the difficulties of reconciling the modern day peculiarities of authors' rights with the concept of property. Such difficulties are, for example, the limited duration of copyright (property rights are generally perpetual), and the concept of droit moral which is discussed in Part III.<sup>1</sup>

In England, the Copyright Act, 1710, established literary property after nearly two centuries of various attempts to control and regulate printing, the presentation of plays, and the book trade. While originally focussed on preventing unlawful reproduction of books, following upon the invention of printing in the 15th century, the law was gradually extended to the protection of sculpture, dramatic works, musical works, painting, drawings, and photos, and to performing rights in certain works.<sup>2</sup> By 1911, this expansion of protection was codified in a United Kingdom Act providing protection to literary, dramatic, musical and artistic works.<sup>3</sup> Technological developments were recognized in the provision of the sole right to make any record or film by means of which certain works could be mechanically performed or delivered.

In contrast to the common law system - an empirical system based on expediency - European thought recognized that an author's rights

1. See p 53.
2. For a discussion of the historical aspects of copyright, see Copinger and Skone James on Copyright: Sweet & Maxwell, London, 1971; 11th edition, chapter 2.
3. Part of the reason behind this codification was to reflect the commitment to protect such works, as required by the Berne Convention.

consist of two elements: his moral rights in terms of his personality in relation to his works, and his pecuniary rights, that is the right to exploit his works. The personal element of copyright was stressed, for example, in the development of French law, leading to clear definition of the personal, or moral rights of an author. These personality rights led to a theory envisaging copyright as a dual right incorporating pecuniary and moral rights. Canadian law, copied from the English law, has not attached any significant degree of importance to the "personal rights" of authors.

The leading theory today is that of the "pragmatic school": copyright should be determined by statute law based on an analysis of all the interests involved, with emphasis on the public interest. A pragmatic analysis of these interests leads one to express the rights granted in terms of exclusive rights of authors. Whether or not one considers those rights a property right or another kind of right is of no material consequence, if the results are the same. Concern with the underlying social philosophy of copyright law is unwarranted unless different theories lead to different conclusions.

## B DEVELOPMENT OF CANADIAN COPYRIGHT LAW

### 1. The Canadian Act

Copyright law in Canada reflects the theory of intellectual property which emphasizes authors' property interests. It was first expressed in a Statute of the Legislature of Lower Canada in 1832.<sup>2</sup> The British North America Act, 1867 conferred exclusive jurisdiction concerning "copyrights" upon the Federal Government<sup>3</sup>, and several Acts were subsequently passed,<sup>4</sup> culminating in the present Act, 1921<sup>5</sup>, which superseded all previously applicable Imperial legislation and, with the exception of transitional provisions regarding existing rights, repealed all prior legislation.

The present Act came into force on January 1, 1924. It provides that no person is entitled to a copyright or any similar right in respect of protected material, otherwise than in accordance with the Act, except as to "any right or jurisdiction to restrain a breach of trust or confidence".<sup>6</sup>

The Act, closely modelled on the UK 1911 Act, has not been revised since its adoption; it has been amended from time to time, most notably in 1936 to permit the control of performing rights societies. Other minor amendments were made in 1966, 1967-68, 1968-69, 1971 and

1. Exemplified by the paternity right: the right to claim authorship, the right to protect the integrity of a work from distortions; the right to publish and withdraw a published work; see p 53.

2. 2 Will, IV, c 53

3. S 91 (23)

4. 31 Vic., c 54; 38 Vic., c 88 - subsequently RSC 1906

5. Copyright Act RSC 1927, c 32, RSC 1952, c 55; RSC 1970, c 30

6. Copyright Act, s 45

finally in 1975.<sup>1</sup>

## 2. The Ilsley Commission

The Copyright Act was the subject of an Inquiry by a Royal Commission (hereinafter referred to as the Ilsley Commission) appointed in 1954, which published its Report in 1957.<sup>2</sup> No action was taken pursuant to that Report, although a Departmental Committee considered the technical implications of the Commission's Report.

The Ilsley Commission was appointed to inquire into whether federal legislation relating in any way to copyright affords a reasonable incentive for the development of literary and artistic talent, for creativeness, and for making available to the Canadian public literary and artistic creations in a manner and on terms adequately safeguarding the paramount public interests, keeping in mind any relevant international conventions to which Canada was a party.

That Commission, in part, recommended that Canada not accede to the 1948 Text of the Berne Convention (Brussels) and should remain at the 1928 (Rome) level of the Convention. The Commission based its recommendation on a number of points, which rest primarily upon not being willing to recommend general increases in the levels of protection or extension of protection that would be required by the Brussels Text, and to undertake to provide a mandatory term of protection.<sup>3</sup> The Brussels Text was also rejected on the ground that Canada would not be permitted to denounce it for at least six years and would have to submit disputes to the International Court of Justice.

The Commission went further to say that it saw no advantages in remaining within the Berne Union and that in fact there were disadvantages in doing so. The Commission thought that Canada had been perhaps not too well advised in becoming a member of the Berne Convention, being the only country in the Western Hemisphere to do so. The Commission recalled that Canada became bound, originally, in 1887, by virtue of the United Kingdom's ratification.

The Commission did however recommend that Canada ratify the Universal Copyright Convention (1952)<sup>4</sup> on the basis that the main advantage to Canada was that Canadian authors would receive copyright protection in the United States, upon complying with the relatively simple

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1. Cultural Property Export and Import Act; SC 1975, c 60, not yet proclaimed.
  2. Royal Commission on Patents, Copyright, Trademarks and Industrial Design: Report on Copyright, Queen's Printer, Ottawa, 1957.
  3. It is a requirement of accession to an international copyright convention that a state's copyright law conform to the responsibilities and rules imposed by the convention.
  4. Which it did, effective August 10, 1962.

formalities required by the Convention, and further on the basis that the Canadian printing trade might benefit from such action.<sup>1</sup>

While the Commission stated it would not recommend denunciation of the Berne Convention it suggested that "at future convention revisions the growing economic and commercial significance of intellectual property be accorded greater recognition."<sup>2</sup> The Commission went on to note the increasing importance of the entertainment industry, and the concomitant expanded use of intellectual property, and expressed misgivings as to whether the requirements of the Berne Convention and the UCC "will be found desirable in the future".<sup>3</sup> The Commission wished to minimize the difficulties of ascertaining copyright ownership and transfer.

Apart from dealing with international conventions, the Commission made a host of specific recommendations on the revision of the domestic law. These recommendations will be discussed at appropriate places in Part III. However, it may be interesting to conclude these general remarks on the Ilsley Report by quoting what it had to say on the meaning of copyright:

The right is regarded by some as a "natural right" on the ground that nothing is more certainly a man's property than the fruit of his brain. It is regarded by others as not a natural right but a right which the state should confer in order to promote and encourage the labours of authors. Generally speaking, those who appeared before us advocating strong and long protection held the first view; those who were in favour of weaker and shorter terms of protection held the second. We find it unnecessary to go on record with a confession of faith in either doctrine to the exclusion of the other.<sup>4</sup>

### 3. The Economic Council Report<sup>5</sup>

#### (a) The Council's Philosophy

As the impetus for the revision programme, the Economic Council's Report requires careful consideration, as it represents a point of departure for the recommendations made throughout the Working Paper.

1. Ilsley Report, op cit, p 16. (One of the requirements for copyright protection in the present USA copyright law is that books in the English language must be manufactured in that country. That requirement is now met by complying instead with the notice provisions of the Universal Copyright Convention. The USA copyright law which will come into effect January 1, 1978 provides an exemption for Canada from the "manufacturing clause".)

2. idem, p 18.

3. ibidem

4. ibidem, p 9

5. See footnote 1, p 1.

The Council saw its recommendations as providing a broad framework in which questions of intellectual and industrial property could be viewed in a more coherent way, having regard to the public interest. This framework would assist in the formulation of policy on a sounder and more consistent basis within the larger context of innovation policy and information policy. Stressing the relative novelty of the economics of information, the Council suggested that the field of intellectual and industrial property deserved increased attention from social scientists.

The recommendations that were made were of a different order and character in respect of copyright than was the case with patents. The recommendations respecting patents were basically policy matters, but the copyright recommendations were considered by the Council to form a basis for the development of a policy and were not policy recommendations as such.

Identified as the single most important reason for the examination of intellectual property was that the laws are part of the larger related areas of innovation policy and information policy. The Council took the view that intellectual property must cease to be regarded as a relatively specialized and esoteric activity and instead be incorporated into Canadian economic policy. Also identified as reasons for review were changing technology, international trade, competition policy, and international comity. The Council considered the question of innovation and information as the central issue and then brought within that defined ambit the fields of intellectual and industrial property.

The Council saw the interest of authors in copyright as being entirely natural and proper. It also sought to bring the general public and consumer interest effectively into an area where it has not been adequately considered before.

#### (b) General Considerations

Consistent with the emphasis placed on the public interest and on economic analysis were the three central themes adopted by the Council in making its recommendations: (a) the importance of the interest of the general public, particularly consumers, (b) the importance of the efficient and productive use of the totality of Canadian economic resources, and (c) the economic importance of information, particularly in relation to innovation.

The Council felt that Canada had not yet achieved an optimum information policy, and that parts of the total information system suffered from an underlying tendency towards underproduction. It suggested that the provision of incentives would rectify this situation.

While acknowledging intellectual property's social usefulness, the Council saw a need for the law to reflect information and innovation policies as well as science and competition policies. It also recognized that the law should be coordinated with incentive and innovation programs (e.g. grants, awards, industry financing, subsidies, tax concessions, government sponsored research, and support for education systems).<sup>1</sup> For some cases, alternative forms of incentive or a mixture with other incentives were seen as perhaps being more efficient for Canadian purposes.

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1. The extent to which this may be possible remains to be explored.

The Report emphasized the Council's view of the critical economic importance of information, not only as a commodity with its own cost and value, but also as perhaps the most important single industry in a post-industrial society. It stressed the interdependence between the production, distribution and utilization of information. Consistent with this emphasis, the Report proceeded primarily from the premise that intellectual property rights were justifiable in economic terms, rather than by virtue of a "natural rights" theory.

The Council expressed the view that a private right to exclude was an unnecessarily costly method of guaranteeing financial reward, and favoured compulsory licensing, whereby it thought public access and private compensation would be ensured.<sup>1</sup> It felt that the costs of the existing system could be evaluated in terms of certainty, speed, opportunity, and contestation expenses.

In terms of international matters, the Council took note of the existence of treaty obligations and the related inhibitions on domestic freedom of action. Recognizing that Canada is a "heavy net importer" of intellectual and industrial property, the Council suggested that Canada would be likely to have an interest in adhering to international conventions at less than the maximum level of protection available to member countries, and, in the light of that interest, to retain its freedom to maintain patent, copyright and design protection on a shorter-term and less-extensive basis and to issue compulsory licences more often.

In sum, the Council stated that Canada should be prepared to pay a price for full participation in the global information and innovation system, but it should not pay too high a price. The Council placed great emphasis upon its view that intellectual properties are "incentive devices, designed to elicit more of certain kinds of 'learning' or knowledge creation and certain kinds of knowledge processing."<sup>2</sup> With respect to copyright in particular, the Council felt the aim should be the conveyance of information to a broader public.

The most difficult general copyright problem in the Council's view was the accommodation of such new technology as reproduction and communication. The Council indicated that it saw three dimensions to handling the new technology: (1) ensuring that established principles are neither eroded nor work in unintended ways, (2) making the law specific enough to offer workable guidance to the well-meaning layman, and (3) enforcing copyright law in the new areas.

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1. The Council never expressly defined what it meant by "compulsory licensing" and one is left with attributing to these words their most obvious meaning. It would appear that where the Council favoured compulsory licensing, the exclusive rights of a copyright owner would be replaced by a sole right of remuneration; the copyright owner could not object to the proposed use of his work but would presumably be paid for that use. As to how the remuneration would be fixed, the Council did not provide much detail.

2. Economic Council Report, op cit, p 31.

With respect to cultural goals, the Council's copyright proposals were based on the assumption that Canadians are prepared to pay something for a strong and distinctive cultural identity. However, it also warned that Canada should not sacrifice educational or scientific quality in the name of national culture.

(c) The Guidelines

Apart from the general considerations treated above, the Report enunciated general copyright guidelines to assist in the formulation of policy for meeting specific problems and which were consistent with the Council's views.<sup>1</sup>

The guidelines can be summarized as follows:

1. Authors should be compensated in proportion to the extent to which their work is used, and each user should pay his fair share. The major limitations on these principles were seen as (a) the needs of libraries in terms of making information available and (b) the need to have a practicably enforceable system, without costly policing.
2. In the public interest, ready and low-cost access to information is desirable. There should be minimal interference with the processes by which information is exchanged.
3. Copyright should be used in its incentive capacity, and should not be used as an economic and informational barrier to trade between Canada and other countries, nor should it be used contrary to competition policy.
4. Canada should seek the lowest cost obtainable for access to foreign information, while paying a fair amount as an incentive to copyright holders. Since the copyright treaties require nondiscriminatory rules,<sup>2</sup> incentive tools other than copyright should be used as special encouragement to Canadian authors and artists.
5. There is no evidence to justify either substantial increase or decrease in the basic levels of kinds of Canadian copyright protection, except that of lateral extension to take account of new media.

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1. Two council members, however, refused approval of the Report, specifically objecting to the recommendations of the Copyright chapter. One member preferred that copyright be treated more as a "natural property right" rather than on an economic basis, and felt that such a change would result in more extensive protection for authors. Another member favoured the recommendation of an exclusive right in performances, with the expectation that this would increase payments to performers by giving them extra control over the recording and replaying of their performances. (Report, p x).
  2. But only as regards certain works, see p 21.

6. Copyright law has a limited capacity to alter the distribution of remuneration between creators and their distributors, and any problem is more a function of relative bargaining power, dependent, from a creator's point of view, on the quality of work, reputation, and collective support.
7. Given the needs of today's high speed information systems, it should be easier than it now is to trace ownership of copyright to remit royalties.
8. Use of new technology to improve efficiency in the dissemination of information should be encouraged.
9. The risk of monopoly influence and censorship, whether private or State, should be minimized. These are dangers that should constantly be guarded against by Parliament, the mass media and the public.

The Council referred to "a host of special and specific problems"<sup>1</sup> requiring attention and made certain recommendations. These, however, were made within the parameters of the following significant statement found in the Council's fifth guideline:

We are therefore not recommending any substantial reduction in the basic amount or kind of protection offered to holders of Canadian copyright, but by the same token we urge that there be no substantial increases either, for the existing 'levels of protection' seem already quite sufficiently high, incentive-producing and costly.<sup>2</sup>

The Council took the view that the detail of revision should be worked out more or less consistently once the basic policies were established, and found it neither feasible nor within its terms of reference to make specific detailed recommendations about all, or even most, of these problems. Accordingly, the Council decided that, as the

outstanding problems in the field of copyright were exceptionally numerous and complex ... the most useful course to follow has seemed to be that of placing copyright in a broad framework of economic analysis, stating some general guidelines perhaps durable enough to assist policy-makers in meeting a succession of particular problems over the next decade or so.<sup>3</sup>

Suggestions were made about machinery for dealing with evolving problems under conditions of rapid and continuing technological change.

Keeping in mind the general guidelines, the specific recommendations of the Council are reviewed in detail at the appropriate places in Parts III and IV of this Paper.

1. Economic Council Report, op cit, p 148.

2. idem, p 144

3. ibidem, p 140

#### 4. Departmental Studies

In 1969, anticipating the Economic Council's Report, Consumer and Corporate Affairs Canada established an ad hoc Interdepartmental Copyright Committee. Its purpose was to consider a number of then current problems and to identify private and public interests, preparatory to revision. The Committee held hearings to give those with copyright interests an opportunity to present views, discuss problems and make recommendations.<sup>1</sup> A significant amount of useful material and information was available from a variety of interests presenting sometimes widely divergent views. This material (the Ilsley Report, briefs to the Interdepartmental Committee, the Economic Council Report, and subsequent briefs), together with consultation held with the private and public sectors, provided a mass of detail and information.<sup>2</sup>

#### C REASONS FOR REVISION

When enacted, the present Copyright Act dealt adequately with the concerns of its day. Today, however, it appears less than adequate and requires revising for a variety of reasons, including those advanced by the Economic Council within the broad framework of economic analysis.<sup>3</sup>

Technological developments alone are a compelling reason for revision, in that they have given birth to a range of new works and so-called "rights", both in terms of authorship and in methods of utilization. Changing relationships between creators and users of new works have

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1. A total of 41 briefs were received from 30 organizations (out of 97 invitations sent).
  2. During the period of 1971 to 1975 a large number of briefs and letters were received by the Department, expressing a variety of views as to what should be contained in the new Copyright Act. In addition, particular reference was made to: the Report of the Copyright Committee, (UK 1951), hereinafter referred to as the Gregory Report, and the resulting Copyright Act (1956); the Report of the Copyright Committee, (New Zealand 1959), and the Report of the Committee ... to consider ... the Copyright Law of the Commonwealth, (Australia, 1959); and the U.S.A. Studies on Copyright, preparatory to revision of that country's law.
  3. The Council pointed out that "an increasingly unreasonable burden is being thrown on the consciences and amateur legal expertise of such people as librarians and copying-machine operators" (p 133) and that there is a "growing enforcement problem, largely left to persons without special legal knowledge". But overall, the Council was mostly preoccupied with bringing "the general public and consumer interest effectively into an area of public policy where it has not been adequately expressed and implemented before" (p 2), as well as with improving "the dynamic allocation of resources in the Canadian economy" (p 3) and drawing "greater public attention to the growing importance for Canada of economic arrangements bearing on knowledge and information" (p 3).

made necessary new means of doing business. Partly as a consequence of this, but also for social and political reasons, there have been significant changes in cultural consciousness and national identity, and an increasing awareness of the needs and rights of the creative community. Furthermore, the economic importance of copyright is becoming of increasing concern, particularly in light of Canada's status as a net importer of copyright material. International developments and Canada's commitment to international copyright conventions require reassessment and must be considered when designing a contemporary Copyright Act.

#### 1. New Technology

Having originated in the era of print technology, the present law does not cover certain technological developments, particularly those of sound motion picture film, videotape, sound recordings, television, cable television, photocopiers, information storage and retrieval systems, computers and a range of technological delivery systems which are an integral part of our modern communications age. There has been a failure of copyright legislation to keep up with contemporary commercial practices.

Today's technology makes possible the simultaneous dissemination of works throughout the world. This creates problems in monitoring utilization of works. Furthermore, technology raises problems regarding the definition of new types of protected works and associated rights. New means of infringement and new legal relationships have been identified and require resolution. Not all modern day problems can be solved by mere analogy to old situations.

During the time when a book was the main delivery system for copyright works, the system worked very well as the content and the carrier were inseparable. However, computers and copying machines have changed the situation. Computer services make available not only works directly from publishers but also derivative works such as indices and compendia, which can effectively compete with the sale and distribution of the original material. Thus, technology has made it possible to separate the substance from the carrier. Moreover, microfilm is becoming a direct substitute for printing on paper as the medium for publishing, and is in itself better suited for the purposes of computer and copying technology.

The conflict between owners of copyright and those who wish to use technology for more rapid and less costly dissemination of the information contained in protected works is discussed at length in the Economic Council's report. On the one hand there are those who make information available by means of a particular form of expression which, alone, is protected by copyright. On the other hand, there are those who need this information but find it either too time-consuming or too costly to extract. They cannot see any easier, faster or cheaper way of getting the information they need than using directly the protected original form of expression by which that information was conveyed. In the words of the Council, they "have no great penchant for the role of law-breaker, even in the most technical and accessory sense",<sup>2</sup> and are therefore

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1. "new" in this context means since 1924.

2. Economic Council Report, op cit, p 133.

pressing for changes in the copyright law which would entitle them to use protected works either completely without charge, by way of general exemptions, or on payment of a minimal royalty, by way of compulsory licences.

The conflict is inevitable because the opponents do not even view the issues in the same way. Copyright owners are concerned with forms of expression whereas users of protected works maintain they need access to information. Obviously, such a conflict cannot entirely be resolved by a revision of the copyright law. It is, however, one of the aims of this Working Paper to try and find an equitable balance of the interests of owners and users of material protected by copyright.

Modern technology may have the effect of depriving the author of control over his work. Should such be the result of a new Copyright Act, Canadian authors might not make their works available or might seek means of exercising control other than by copyright. For example, they might first publish their works in foreign countries, thereby seeking the protection of foreign jurisdictions as, under the copyright conventions, the country of first publication becomes the country of origin of the work, which in turn determines the regime of protection for that work. Thus, Canadian authors who first publish in foreign countries would have, in Canada, the protection accorded to foreign authors here. As such, their works could not be treated below the set convention minimum standards.

Certainly, conditions should not be created which would lead to fewer and higher-priced works being published in Canada. For example, if works were stored in information systems and were accessible only to subscribers upon payment, this might lead to fewer works being published. In this example, the consumer could only be the loser.

Technological development has created difficulties for the courts in construing and interpreting the Act in relation to problems which the Act was not designed to solve.<sup>1</sup> As noted, technology has created novel means of infringement and new legal relationships as well as problems in monitoring utilization of works. The private and public sectors therefore consider revision necessary if only for the purposes of introducing greater certainty in their affairs and avoiding unnecessary litigation.

However, while problems emerging from technological developments have been put forward as requiring sweeping changes in the copyright law, it is suggested that the legal questions which arise do not pose insurmountable obstacles. The problems can be met by using existing principles, enlarging existing mechanisms, assimilating technological change, all without eroding the bases of the system.

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1. See, for example, Warner-Bros.-Seven Arts Inc. et al v CBSM-TV Ltd; (1971) 65 C.P.R. 215 (Exchequer Court of Canada, January 25, 1971); on videotape, cablecasting and electromagnetic techniques. Canadian Admiral Corporation Ltd v Rediffusion Inc.; (1955) 20 C.P.R. 75 (Exchequer Court, May 21, 1954); on community antenna television operations. Blue Crest Music Inc et al v Canusa Records Inc., et al; (1975) 17 2d-CPR 149 (Federal Court, October 11, 1974); on the pressing of records.

## 2. Change in Cultural Consciousness

### (a) Culture and copyright

Cultural quality primarily depends upon a country's intellectual and artistic creations and, to a large extent, is a reflection of the encouragement and protection provided to creators. Copyright law may greatly influence the extent to which people engage in cultural activities. The development and maintenance of healthy cultural industries in any country encourages and promotes the training and retention of creators and the arts and crafts personnel associated with the industries.

Further, there has been an increasing degree of consciousness on the part of creators of the need to assert their rights and vocalize their interests more vigorously. In so doing, the general objective of creators appears to be the improvement of their economic position through the increasing expression of solidarity, the seeking of public financial support, and the introduction of demands involving a wide range of legal areas. Examples include demands for a public lending right (a fee each time a book is lent by a library) and a "droit de suite" (participation by an artist in the proceeds of successive sales of his original work); increased attention to "cultural" education; and demands for returns proportionate to use of their works. Additionally, strong representations are being made in favour of recognizing new rights, such as the right of a performer in his performances.

Also being explored are the possibilities provided by the collective assertion of rights. For example, two Writers' Unions were recently formed in Canada - not a North American phenomenon, for associations of creators have existed elsewhere for quite some time -. What is new is the tone of increasing militancy. The example was set when, in 1969, at the founding of the Association of German Writers, it is reported<sup>1</sup> that an "end to reticence" was proclaimed. With the goal of pursuing their economic interests, the Association goes far beyond copyright and concerns itself with pension plans, insurance, improvement in conditions, wage matters and a wide range of policy development. It attaches great importance to the possibilities afforded by copyright law for improving these conditions for authors.

Those holding such views feel that the basis of copyright law should be that one is entitled to the fruits of one's labour, perhaps best expressed in the statement: "copyright is the most natural of all titles - because it is a tenure by creation" (Disraeli). In any revision of the law, therefore, care should be taken not to subordinate the rights of authors to those of entrepreneurs or users.

### (b) Role of the federal government

The Federal Government has varying responsibilities and interests in the field of copyright. It is responsible for providing the legal system governing the granting and exercising of rights coming within

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1. Dietz, A.: The Social Endeavours of Writers and Artists and the Copyright Law; IIC; Vol 3; No. 4, 1972; p 451

"copyrights",<sup>1</sup> and must ensure that the legislation is designed within the ambit of departmental responsibilities and government policy. In another dimension of involvement, the government is both a major user and a major producer of copyright materials. To that extent, it has certain conflicting interests. On one hand, it may prefer free access to copyright materials for the benefit of the public (which access presumably could be achieved by expropriation). On the other hand, it recognizes the need to protect the taxpayer's interest in materials prepared and issued by the government.<sup>2</sup>

Further areas of Federal Government responsibility include broadcasting and communications policy, cultural policy, the creative arts and industrial development. To varying degrees, copyright has inter-relationships with all of these. Therefore copyright may be a policy in itself, or a means of furthering other policies.

For example, the present mandate of the Department of the Secretary of State encompasses the encouragement, development and expansion of a Canadian cultural identity, within the matrix of a bilingual but multi-cultural nation. The role imposed by that mandate requires the formulation and development of coordinated policies in cultural activities, both domestic and international.

The attempt to coordinate various policies is evidenced by the role and objectives of the Interdepartmental Committee on Publishing, established by the Secretary of State to carry out the Cabinet's policy of assistance to the Canadian publishing industry. While the problems and solutions have been directed mainly toward financial matters, copyright policy and legislation are seen by that Committee as fundamental tools for further assistance.

Copyright is regarded by the publishing industry as indispensable to its continued existence. The Report of the (Ontario) Royal Commission on Book Publishing stated: "If there were no copyright protection, there could be no profession of writing. Without authorship, there could be no book industry - no publishing, no bookselling, no librarianship".<sup>3</sup>

In light of the international copyright conventions and the non-discriminatory treatment of convention works by convention members, use of the copyright system may not be appropriate for the artificial support of any particular industry. While the development of a federal publishing policy is a matter of concern to both the federal department responsible and the particular industry, the Copyright Act may well be an unsuitable vehicle for protecting the domestic publishing industry.

In terms of copyright law and the publishing industry, various proposals have been advanced: from providing a Canadian manufacturing clause (a violation of copyright convention responsibilities), to

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1. British North America Act, s 91(23).
  2. For a discussion of Crown Copyright, see p 223.
  3. Royal Commission on Book Publishing, Canadian Publishers and Canadian Publishing, Queen's Printer for Ontario, Toronto, 1972; p 79.

the creation, by import prohibitions, of an absolute monopoly for agency operations.<sup>1</sup> The question that arises, however, is whether copyright should be used to support the policies of other government departments regarding particular industries. For example, should copyright be used: to arrest the trend towards increasing foreign ownership of both publishing and distribution; to provide a means of strengthening the operations of publishers, distributors, and wholesalers; to strengthen the Canadian book store network; or to provide monopolies to agents of foreign publishers?

The federal government's proprietary interests are reviewed in Part IV of the Paper, and are therefore not discussed here. Similarly, the extent to which any new copyright law would affect the areas of overlap with other government policies are dealt with, either directly or by implication, throughout the Paper.

### 3. Impact of international copyright conventions

For the same reasons which dictate protection of authors at the national level, the necessity of protection at the international level has long been recognized. International copyright conventions<sup>2</sup> create obligations to protect nationals of other contracting states. Prior to 1886, international copyright was regulated by a mosaic of bilateral agreements, differing in approach and substance. Particular national interests, legal doctrines and economic policies accounted for substantial variances in the extent of protection. The inadequacy of bilateral treaties in meeting the needs of those interested in the international dissemination of copyright materials resulted in the founding of a Union in 1886 - the Berne Convention - for the protection of literary and artistic works.

International copyright is organized to ensure a certain standard of copyright protection in countries that are members of a convention. To a very great extent, by imposing minimum requirements, the conventions restrict the degree of flexibility that can be exercised in changing domestic law. States which adhere to copyright conventions must agree to extend protection to nationals of other member countries on a quid pro quo basis.

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1. "We have been told in some of the hearings that we should recommend embargoes, or at least quotas, on the importation into this country of books from abroad. Some of these recommendations have come from individuals and firms who have demonstrated by their editorial postures and preferences that they abhor every kind of restriction on their own freedom to speak, to listen, and to demonstrate, whenever they wish to do so. It is difficult to imagine how much intellectual censorship is really wanted, therefore, by those who advance such incongruous proposals. It is even more difficult to reconcile their recommendations with what publishing is all about", *idem*, pp 49-50.
  2. The Berne Convention and the Universal Copyright Convention (UCC).

## (a) The Berne Convention

The Berne Union has revised its Convention several times,<sup>1</sup> the latest revision being in 1971. Broadly speaking, the basis of the Convention has evolved from a national treatment concept to the point where the main emphasis is now upon Convention law which imposes minimum standards of protection for Convention works. As of January 1, 1976, the Convention had 65 members; however, three important countries are not parties to the Convention: USA, USSR and China.

The Convention is periodically revised through diplomatic conferences of revision, the object of which is "to improve the system of the Union" (Article 27). Revision conferences are held to amend provisions in the light of technological change and new means of utilizing works. Succeeding revisions of the Berne Convention have increased the extent of protection.

Canada has been a member of the Berne Convention since its inception in 1886; first as a country for which the United Kingdom was responsible and later, as an independent nation. Canada is presently bound by the Rome Text (1928).

It should be noted that both the Ilesley Commission and the Economic Council recommended that Canada should not ratify any later Text in light of the fact that, by so doing, it would further restrict its flexibility in revising its domestic legislation.

## (b) The Universal Copyright Convention (UCC)

Certain countries, because they either did not, or could not, conform to the Berne standards, or because of fundamentally different legal systems, did not join the Berne Convention. Given the need to have more formal legal relationships between Berne and non-Berne countries, a solution was sought by means of a new, less stringent, convention: the Universal Copyright Convention (UCC).

The Convention, formulated in 1952, came into force in 1955. It is a "national treatment" convention, each member country giving the protection of its own law to nationals of other member countries. The UCC makes relatively lower demands on its member nations. However, the 1971 revision<sup>2</sup> of that Convention introduced more stringent standards, increasing the minimum protection required to be given by member states. As of March 1, 1976, the 1952 UCC had 69 member states. Canada joined the Convention with effect from August 10, 1962,<sup>3</sup> and remains at the level of the 1952 Text.<sup>4</sup>

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1. Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971). The Paris text came into effect October 10, 1974.
  2. Paris (1971), which came into effect July 10, 1974.
  3. No changes were made in the Canadian Act, however.
  4. The 1971 Text has 20 member nations as of March 1, 1976.

## (c) Canada: a net-importer

Technological and substantive developments have made it necessary for Canada to engage more actively in international copyright affairs. While participating more on the international scene, Canada has been careful not to prejudice the revision of its domestic law by accepting further international commitments.

Net exporting countries have a keen interest in high levels of protection,<sup>1</sup> but Canada as a net importer, has interests which lie elsewhere. Since conventions are non-discriminatory, Canada, in acceding to conventions requiring higher levels of protection, would have to extend that protection internationally (for convention works) with no right to demand reciprocity. As was stated by both the Iilsley Commission and the Economic Council, it is not in Canada's best interests to increase its deficit in trade in copyright materials by acceding to later Texts of either convention. The time has come for Canada to reassess its international position in terms of copyright, and to reflect that position in its domestic law.

## D CONSTRAINTS IMPOSED ON REVISION

The Berne Convention does not dictate domestic law but only prescribes certain minimum standards of protection for foreign works. However Article 4(1) of the Rome Text calls into question whether any valid distinction can be made between protection of foreigners and protection of nationals in respect of convention works. Article 4(1) provides that foreign authors who are nationals of Berne countries enjoy in each Union country, except in their country of origin, the rights granted by the Convention, plus the rights provided by their respective national laws and those that domestic legislation "may hereafter grant to natives" in respect of works protected by the Convention. Therefore, under the Rome Text, while Canada is obliged to protect convention works and provide convention rights, the complete range of rights associated with works will ultimately depend on domestic law. This does not, however, prevent the protection of non-convention works for the benefit of Canadians. That interesting possibility is the subject of further discussion in the following pages.<sup>2</sup>

The UCC on the other hand only requires "adequate and effective protection of the rights of authors and other ... proprietors"<sup>3</sup>

1. Recently, international agreements have been reached to protect sound recordings, type faces, and satellite signals see p 226; studies are being conducted at the international level into the possibility of international regulation of photocopying, translators' rights, protection of folklore, cable television and videocassettes.
2. See p 21, below (Convention and non-convention material distinguished).
3. Article 1. What is "adequate and effective" is not defined in the Treaty. There are no criteria for determining whether or not protection granted by any contracting State is adequate or effective.

in certain works, an illustrative listing of which is given in the Convention. Unfortunately, Canada cannot benefit from certain special advantages afforded by the UCC. These are only available if the law of the acceding country contains certain provisions at the time of accession.<sup>1</sup>

### 1. Available Options

With respect to international conventions the options that are available to Canada are several:

- . acceding to later Texts of either, or both, conventions;
- . withdrawing from one, or both;
- . maintaining the status quo.

#### (a) Accession

The UCC 1971 Text provides for certain additional rights which remain largely undefined and which would impose a higher level of participation on Canada. Similarly, accession to later texts of the Berne Convention would require assuming increased responsibilities, contrary to the Economic Council's view which, it is submitted, is sound.

#### (b) Withdrawal

The effect of leaving the Berne Convention (while remaining in the UCC) would be that Canadian works would not be protected in Berne countries, including those Berne countries which are also UCC countries, i.e. in the majority of countries. By virtue of Article 17 and the Appendix of the UCC (the "Berne safeguard clause"), a Berne country which is also a UCC country is prohibited from denouncing the Berne Convention and relying upon the UCC for protection in those Berne countries which are also members of UCC. Therefore, a country leaving Berne but remaining in the UCC would have obligations under the UCC but would receive no protection for its works in any country subscribing to the Berne Convention. Canadian works would be protected in countries subscribing only to the UCC. Yet, Canada would be bound to protect under the UCC the works of all UCC countries including those Berne countries with which it no longer had Berne relations.

Withdrawal from the UCC alone would mean the full application of the US manufacturing clause<sup>2</sup> against Canadian works, and the loss of copyright protection in those countries members of the UCC only. Canada would retain its international ties with members of the Berne Union.

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1. Article 10 provides that each State undertakes to adopt the necessary measures to ensure the application of the Convention and that each country must be in a position under its domestic law to give effect to the terms of the Convention. If, prior to accession, a country had a law which prevented giving effect to the Convention, or which requires amendment to give effect to the Convention, then such a country should have had to adopt such measures as necessary to ensure the application of the Convention. Canada did not take such action.

2. See footnote 1, p 7, above.

If Canada decided to withdraw from both conventions, then presumably it would be possible to negotiate bilateral agreements with many of the countries with which it formerly had convention relationships. However, the original purpose of conventions was to avoid a morass of bilateral agreements; such regressive action on the part of Canada would call into question the wisdom of denouncing the conventions in the first place.

In the absence of such bilateral agreements, the consequences of withdrawal from the conventions would be that no foreign works would need to be protected in Canada but Canadian works would not be protected in foreign countries either.

(c) Status quo

Maintaining the status quo merely means that Canadian works would be protected abroad by the present conventions, and that the protection of foreign works in Canada would also accord with these conventions.

2. Convention and non-convention material distinguished

Despite the constraints placed on flexibility by the non-discriminatory nature of the conventions, it remains possible to control the protection of material other than "convention" works, and to extend protection to certain Canadian works without adding to the imbalance of trade.

The Berne Convention requires convention treatment to be accorded to convention works, but only to such works.

Similarly, Art. 1 of the UCC provides:

Each contracting state undertakes to provide for the adequate and effective protection of the rights of authors ... in literary, scientific and artistic works including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

Certain works fall outside of the ambit of protection as spelled out by the wording of the conventions. Sound recordings are not protected by either convention, as evidenced by the existence of separate treaties which protect sound recordings. Nor do the conventions require, for example, the protection of broadcasts, editions, computer programs, or performances.

This makes it possible, in domestic copyright law, to distinguish convention and non-convention subject matter, as has been done in the United Kingdom and Australia. If it is considered desirable that protection be accorded to non-convention materials, that protection could either be limited to Canadian interests, or extended to other countries on a bilateral reciprocal basis.

E CONCLUSION

Canada, through a copyright law that reflects the public interest, should strive to provide an environment within which the development of national identity and culture can be fostered. The strategy of differentiating between protection required by the conventions and that which can be provided to Canadians apart from the conventions should be fully considered in light of this objective.

The purpose of copyright, as expressed in the past, has been to guarantee the private property rights of creators. Indeed, from an economic point of view, it can be said that one of the aims of copyright law is the protection of the creator's rights. Remuneration to creators today is guaranteed by granting them exclusive rights. Although the exact amount of remuneration is not determined by law - the creator is left free to bargain with all possible users of his work - one must look at copyright as providing a basic incentive for the creation and distribution of new works.

On the other hand, copyright is not solely an economic matter. It can be seen as also embracing moral rights. Creation can be said to be a part of an author's personality and, on that basis, the author should be the person to decide how his work is to be used. Therefore, the law should not be designed to protect only the pecuniary interest of the copyright "owner", who may well be someone other than the creator.

In the final analysis, the task does not involve the determination of what the basis of copyright law should be, but rather the consideration of new rights and new methods of policing them, and the development of new types of control to deal with situations involving new technology.

It is recalled that the taking or use of the information or knowledge in a copyright work is not prohibited. What is prohibited is the copying of the expression of the information, thereby depriving the creator not of the information he has made available but of the benefits flowing from his exclusive rights. It must also be kept in mind that demands for easier, faster or cheaper public access to copyright works are counterbalanced by opposing demands for the strengthening of copyright. Generally speaking, it is submitted, use of a copyright work should give rise to a right of remuneration. The principle of automatic remuneration is the final stage in the evolution of a system for acknowledging creative contributions, from the early days of patronage through to the property concept of Canadian law.

The foregoing indicates the need for revision of the Act and the range of problems associated with the revision process. However, the factor which will most greatly affect flexibility in revision is the position Canada ultimately takes with respect to its international commitments. The Ilsley Report, the Economic Council Report and the considerations presented here lead inevitably to the same conclusion: that Canada would be ill-advised to accede to later Texts of the copyright conventions.

Other factors must also be taken into account: the conflict between those who wish to have greater protection and those who wish to have easier, and perhaps free, access to copyright material; the effects of the advance of technology; the effect of copyright policy on other government policies; the necessity of striking an equitable balance amongst conflicting interests; and the extent to which it will be necessary to regulate and control the exercise of copyright.

It is sufficiently obvious that the increasing complexity of copyright both legal and technological, and the lag of copyright legislation, have created a situation of uncertainty which needs to be resolved. In the interests of continuity and certainty, the new law should not depart significantly from precedents, but should be flexible enough to provide room for judicial interpretation within the spirit of that law, adaptable to technological developments and reflective of the public interest.

It is with some apprehension that this task is undertaken, for revision in itself may create more complex situations even though to a certain extent it solves old and present problems. However, the need for certainty in modern situations involving copyright requires that this risk be taken.

Further portions of the Paper use the general considerations of this Part as a point of departure. In Part III, the details of the specific problems and issues involved in revision are examined. During the process, the considerations advanced thus far are taken into account and applied in each discussion. Following such discussions, recommendations of a general nature are made in Part IV.

PART II(ECONOMIC CONSIDERATIONS OF COPYRIGHT)

What is the economic importance of copyright? How do those industries which exploit copyright compare in size and importance with other sectors of the economy? What theoretical economic considerations are relevant for a study of copyright?

The following sections attempt to answer these questions. In Section A, the economic size importance of copyright industries is assessed by estimating the contribution made to Canada's Gross Domestic Product by all of those industries which exploit copyright. In Section B, Canada's trade position in copyright for the past decade is presented for all major copyright areas. Finally, Section C discusses the economic rationale for and implications of copyright from a neo-classical viewpoint.

#### A SIZE OF THE COPYRIGHT INDUSTRIES

In recent years, the importance of copyright as an economic/policy tool for achieving government objectives has grown dramatically. There are two principal reasons for this.

The first is that a higher priority has been attached to the goal of achieving an indigenous national culture and with this has come a large number of government programs designed to strengthen cultural identity. Copyright is designed to protect the interests of creative individuals, and therefore contributes to Canada's cultural goals by helping to ensure a continued supply of indigenous creative talents.

The second reason for the increased importance of copyright has to do with the rapid growth of those industries which are spanned by copyright. This rapid growth is largely the result of a technology which has enjoyed a lateral expansion in recent years and is now comprised of many industries which were not even considered at the time of the last major copyright revision.

In order to gain a more complete appreciation of this magnitude and diversification, this section offers an estimate modelled after a previous calculation<sup>1</sup> of the overall size of copyright industries for the United States.

##### 1. Results

- (a) In 1971, copyright industries contributed an estimated \$1.7 billion to the Gross Domestic Product or 2.1% of the total GDP for that year. Table 1 illustrates the relative magnitude of copyright industries compared to other segments of the economy.
- (b) The contributions which individual copyright industries made to the GDP are illustrated in Table 2 according to the respective SIC (Standard Industrial Classification).<sup>2</sup> Printing and publishing still are the largest component

1. "Size of The Copyright Industries", William M. Blaisdell, Studies on Copyright, Fred B. Rolliman & Co., (1963).

2. See, for example, "Standard Industrial Classification Manual", DBS 12-501, 1970.

industries, when taken together (no finer breakdown was available from Statistics Canada). Radio and television broadcasting was second. Commercial printing was third and advertising fourth.

TABLE 1 - SELECTED GROSS DOMESTIC PRODUCT ESTIMATES, 1971 (1)

SIC (*)	GDP originated (**) (\$ millions)
	82,867
<b>CANADA: ALL INDUSTRIES</b>	
Insurance agencies and real estate industry	(9, 2-3) 7673.5
Education and related services	(10, 1) 5322.2
Transportation	(7, 1) 4867.6
Health and welfare services	(10, 2) 4368.7
Wholesale trade	(8, 1) 3736.5
Federal administration	(11, 1) 3170.5
Agriculture	(1) 2793.4
Food and beverage industries	(5, 1) 2696.5
Electric power, gas and water utilities	(7, 4) 2333.5
Accommodation and food services	(10, 7) 2319.4
Finance industries	(9, 1) 2300.4
Transportation equipment industries	(5, 15) 2130.5
Communication	(7, 3) 2119.8
<u>COPYRIGHT INDUSTRIES</u>	<u>1671.7</u>
Primary metal industries	(5, 12) 1637.5
Services to business management	(10, 5) 1622.7
Metal fabricating industries	(5, 13) 1563.7
Paper and allied industries	(5, 10) 1556.2
Provincial administration	(11, 2) 1546.3
Local administration	(11, 3) 1405.4
Electrical products industries	(5, 16) 1351.6
Metal mines	(4, 1) 1312.6
Mineral fuels	(4, 2) 1236.4
Chemical and chemical products industries	(5, 19) 1129.5
Machinery (except electrical) industries	(5, 14) 835.3
Personal services	(10, 6) 828.7
Wood industries	(5, 8) 802.2
Non-metallic mineral products industries	(5, 17) 749.9
Textile industries	(5, 5) 626.5
Clothing industries	(5, 7) 614.9
Forestry	(2) 592.5

(1) Real domestic product by industry: DBS 61-213, Vol 1, No 1

(\*) First number - SIC Division ) Standard Industrial Classification Manual DBS 12-501 1970  
Second number - Major group )

(\*\*) GDP originated by industry divisions (7) of copyright nature has been deducted and assigned to COPYRIGHT INDUSTRIES (see table 2)

## ESTIMATED GROSS DOMESTIC PRODUCT ORIGINATED BY EACH OF THE

## COPYRIGHT INDUSTRIES, CALENDAR YEAR 1971

STANDARD INDUSTRIAL CLASSIFICATION CODE NO (*)	INDUSTRY	GROSS DOMESTIC PRODUCT ORIGINA- TED (millions)
286	Commercial printing	\$ 192.8
287	Platemaking, typesetting and trade bindery industry	18.8
288-9	Publishing only; Publishing and printing	482.3
3932	Toys and games manufacturers	3.4
397	Signs and displays industry	1.7
3994	Sound recording and musical instrument manufacturers	1.9
543	Radio and television broadcasting	336.4
691	Book and stationery stores	26.1
699	Retail stores n.e.s.	20.9
807	Libraries, museums and other repositories	71.6
841	Motion picture theatres	70.4
842	Motion picture production and distribution	48.9
845	Theatrical and other staged entertainment services	
849	Miscellaneous amusement and recreation services	19
862	Advertising services	12.1
863	Office of architects	142.5
869	Miscellaneous services to business management	74.6
893	Photographic services, n.e.s.	75.3
	TOTAL (COPYRIGHT INDUSTRIES)	40.6
	TOTAL (ALL INDUSTRIES)	1,671.1
		82,867

(\*) As set forth in the "Standard Industrial Classification Manual" DBS 12-501, 1970

## 2. Copyright Industries Defined

The definitions used here coincide with those used in reference 1. That is, in order to take on economic importance, a copyright must be exploited for profit. Therefore, this section considers any economic activity which exploits copyright material to be a copyright industry. Although most industries are affected by copyright in some way (e.g. packaging, labels, advertising, etc), the estimate presented here is restricted to those industries which satisfy the above definition. This restriction requires that for some SIC industries, only a fraction of the industry be included since some SIC's contain both industries that do and do not exploit copyright.

## 3. Methodology

The methodology utilized in the current study differs somewhat from that presented in reference 1. This is due primarily to the lack of available data on the contribution of any SIC to national income (which was the measure used in reference 1) and to the differences between Canadian SIC's and those used in the United States. The same general comments made in reference 1) concerning the poor suitability of certain other indicators may also be made here. For example, net income or profitability are both unsuitable for estimating the size of copyright industry because they fail to include some important firms with low profitability. Number of employees may result in the neglecting of important highly mechanized industries. Capital investment suffers from the disadvantage that it may be turned over rapidly or slowly. Total sales is not appropriate since it neglects the effects of factor inputs and interdependent industries.

With these points in mind, it was decided that the most appropriate indicator of those available would be the contribution each industry sector makes to the gross domestic product. In general, this data may be retrieved from the CANSIM<sup>1</sup> databank for each SIC or group of SIC's.

Where it was only possible to receive this data in aggregate form (in order to maintain confidentiality) it was generally assumed that the contribution to the gross domestic product by each individual SIC industry was in direct proportion to the value added estimate for that SIC industry. Value added data for each individual SIC is available in published form.<sup>2</sup> This approximation is similar to that used in reference 1. A more detailed description of the methodology appears in Appendix 2.

## B IMPORTS VERSUS EXPORTS

As is evident from the data of Table 3, Canada's international trade position in materials protected by copyright has shown a remarkable improvement over the past decade for all sectors except the film industry (where the reverse has occurred). Although both imports and exports have grown in all sectors, exports have grown far more quickly than imports in most sectors. A typical example of the

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1. Canadian Socio-Economic Information Management System  
(maintained by Statistics Canada).

2. DBS 31-203 General Review of the Manufacturing Industries  
of Canada, Volume 1, 1971.

improvement in Canada's international trade position is the books sector where in 1965 the ratio of imports to exports stood at 27 while ten years later this ratio had been reduced to 12. The ratio for all material protected by copyright dropped from 12.8 to 6.7 (ignoring exchange rate fluctuations).

However, despite the strong gains that have been made, the net deficit position of all sectors appears to be strongly to Canada's disadvantage. For example, the outflow of copyright royalties from Canada showed an increase of 72% from 1972 to 1973. (See Table 4). Unfortunately, no comparable data reflecting change in copyright royalties accruing to Canadian entities from foreign sources was available.

## CANADIAN TRADE OF MATERIALS PROTECTED BY COPYRIGHT (\$,000)

YEAR	BOOKS		NEWSPAPERS + PERIODICALS		PRINTED MUSIC	PRINTED MATTER N.E.S.	
	M	X	M	X		M	X
1965	69473	2503	50000	3429	405	27945	4698
RATIO M/X	27.8		14.6		—	5.9	
	28.1		14.7		—	4.6	
1966	79171	2820	50938	3457	567	26136	5645
RATIO M/X	28.1		14.7		—	4.6	
1967	97638	4264	57209	4369	942	28129	7098
RATIO M/X	22.9		13.1		—	4	
1968	106862	4287	58267	5960	1041	33765	8254
RATIO M/X	24.9		9.8		—	4.1	
1969	124043	5627	64424	7075	1103	39496	11331
RATIO M/X	22		9.1		—	3.5	
1970	127273	7055	65810	10153	1523	45200	12799
RATIO M/X	18		6.5		—	3.5	
1971	133556	8440	71093	11724	2044	45790	12167
RATIO M/X	15.8		6.1		—	3.8	
1972	137048	10330	74419	14478	2334	56053	13464
RATIO M/X	13.3		5.1		—	4.2	
1973	156106	12833	81003	19941	2517	68180	16550
RATIO M/X	12.2		4.1		—	4.1	
1974	173082	15803	98655	25973	4494	84545	22837
RATIO M/X	11		3.8		—	3.7	
1975	207227	17248	118444	27635	4434	92012	21907
RATIO M/X	12		4.3		—	4.2	

Source: see Appendix III, p 244

TABLE 3

YEAR	CANADIAN TRADE OF MATERIALS PROTECTED BY COPYRIGHT (\$,000)						
	PHONOGRAPH RECORDS + BLANKS		FILMS		VIDEOTAPE N.E.S.	MAGN. TAPE N.E.S.	PHOTOGRAPHS
	M	X	M	X	M	M	M
1965	2293	67	4054	1318	906	3860	475
RATIO M/X	34.2		3.1		—	—	—
1966	2370	91	5367	2150	1045	5460	374
RATIO M/X	26		2.5		—	—	—
1967	3142	158	9076	1476	1915	7110	688
RATIO M/X	19.9		6.1		—	—	—
1968	4135	163	12465	1255	1766	10145	463
RATIO M/X	25.4		9.9		—	—	—
1969	3857	270	16013	1505	2834	13495	405
RATIO M/X	14.3		10.6		—	—	—
1970	3168	499	17523	2619	3580	12161	484
RATIO M/X	6.3		6.7		—	—	—
1971	3919	533	15748	921	4575	10342	1299
RATIO M/X	7.4		17.1		—	—	—
1972	5499	751	16564	1027	3764	12995	2432
RATIO M/X	7.3		16.1		—	—	—
1973	7027	1562	17734	842	5275	14507	2816
RATIO M/X	4.5		21.1		—	—	—
1974	10352	1498	18635	1021	7198	18178	2976
RATIO M/X	6.9		18.3		—	—	—
1975	12982	1526	20600	1025	7254	19857	2883
RATIO M/X	8.5		20.1		—	—	—

TABLE 3 (continued...)

CANADIAN TRADE OF MATERIALS PROTECTED BY COPYRIGHT (\$,000)						
YEAR	WORKS OF ARTS	A	B	C	GRAND TOTAL	
		X	M	M	M	X
1965	964	469	4463	1298	165641	12979
RATIO M/X	—	—	—	—	12.8	
1966	1032	460	5935	1379	179202	15195
RATIO M/X	—	—	—	—	11.8	
1967	1746	890	9774	3261	219774	19111
RATIO M/X	—	—	—	—	11.5	
1968	3187	1193	9081	3426	242609	23106
RATIO M/X	—	—	—	—	10.5	
1969	3906	1259	15294	4430	286653	29714
RATIO M/X	—	—	—	—	9.6	
1970	3574	1501	8291	2659	289173	36699
RATIO M/X	—	—	—	—	7.9	
1971	4517	1805	7524	2115	299810	38302
RATIO M/X	—	—	—	—	7.8	
1972	5798	2356	11650	2341	327455	45848
RATIO M/X	—	—	—	—	7.1	
1973	7308	2392	18811	3505	376965	59036
RATIO M/X	—	—	—	—	6.4	
1974	9131	2186	22355	8139	451595	76263
RATIO M/X	—	—	—	—	5.9	
1975	7330	2768	20259	8100	516820	76671
RATIO M/X	—	—	—	—	6.7	

- A) Drawings, etchings - engraving, original  
 B) Paintings and pastels, made by hand  
 C) Sculptures and statues, original

TABLE 3 (end)

## CANADA

COPYRIGHT ROYALTY PAYMENTS TO NON-RESIDENTS BY REPORTING CORPORATIONS  
AND COUNTRY OF CONTROL (millions of dollars)

U.S.A.		OTHER FOREIGN			TOTAL FOREIGN		
1970	1971	1972	1973	1970	1971	1972	1973
10.9	16.2	23.5	41	2.0	1.8	1	1.2
						12.9	18
						24.5	42.2

TABLE 4A

CANADA				TOTAL			
1970	1971	1972	1973	1970	1971	1972	1973
5.2	5.4	5.6	6.6	18.1	23.4	30.1	48.8

TABLE 4B

SOURCE: CALURA DBS 61-210 ANNUAL (1971, 1973)

### C ECONOMIC THEORY OF COPYRIGHT

As indicated elsewhere in this Paper (Part III), copyright bestows a number of exclusive rights on the owner. Therefore, once a person creates a work, no other individual may produce, reproduce, import for sale, perform, transform or even communicate that work without the permission of the original creator.

The right to first sale of the work is implicit in this list since the work may not be produced, copied or imported into Canada without the permission of the copyright owner and also since the sale of infringing copies is prohibited by section 25 of the existing Act.

Before proceeding, it is worth noting that the right is limited in a number of different ways. First, the usual term of protection is life of the author plus 50 years. Secondly, there is no protection against independent creation. Thirdly, the present Act lists a number of exceptions to the exclusive rights granted by the Act.

In addition to these statutory limitations, there are also limitations imposed by the market environment where the copyright is exploited. For example, if there are close substitutes for the work, the exclusive rights may be severely limited. If there are no close substitutes, the right will offer greater bargaining leverage. These market factors are discussed in more detail below.

It is to be noted first however that regardless of these restrictions, these exclusive rights bestow a statutory monopoly upon the owner, i.e. a monopoly made possible by the existence of the copyright statute. The degree or strength of the monopoly for any individual work will depend on both the statutory and the market limitations identified in the preceding paragraph. For example, the incidence of independent creation might be expected to be quite low and its impact on the limitation of the exclusive right relatively unimportant when compared to such (market) factors as the popularity of the author, past successes etc. However, the fact that the monopolistic right may be stronger in some cases than in others does not imply that the monopoly right is non-existent. Indeed, any individual whose works were very popular would be quick to argue that the exclusive rights described above yield a definite advantage in the market.

It is therefore necessary, in proposing copyright revision, to consider the economic implications of a monopolistic right made possible by the existence of the statute.

Firstly, a monopoly right such as this tends to distort the normal market process away from the so-called competitive norm. That is, the market would be more competitive in the absence of the copyright monopoly, other things being equal. It is not necessary to reproduce here the entire argument regarding monopoly and imperfect

1. Monopoly: "the exclusive control of a commodity, service, or means of production in a particular market with the resulting power to fix prices", Funk and Wagnall (1963).

competition since it appears in most microeconomic texts.<sup>1</sup> We merely note that its effects are manifested chiefly in two ways: (1) the buyer of the monopolized goods is charged a higher price by the monopolist than he would be charged under strict competition and (2) the monopolist tends to produce less of the good than he would under strict competition. Although exceptions and special cases of these results have long been the subject of academic discussion, economists do agree upon the competitive norm as the ideal to be strived for and this logic is central to the policies subsequently proposed. How then can one justify such an obvious intervention in the competitive market process as the granting of a legal monopoly to the owners of copyright?

Clearly this must distort the market from that which would transpire in the absence of any such right, other things being equal. The answer to this question is to be found by more closely examining what the situation would be for creators of copyright works if no such monopoly were granted.

Note first, that creative works generally suffer from the economic disadvantage that they are easily appropriable in the market. To illustrate this point, we consider the case of an author who writes a novel when no copyright protection exists. In order to get this novel to market he must incur certain costs (eg. production, marketing, distribution, etc). These costs, together with his costs for creation of the novel, the time and effort of the author, comprise his total costs and according to economic theory, determine what price he will charge in the market. However, once the novel is offered for sale in the market, any interested entrepreneur may purchase a copy and begin to mass produce it. A problem now arises because the author has invested a certain amount of time and effort in the creation of the work whereas someone who has duplicated the work (i.e. the entrepreneur) has invested nothing in its creation. As a result, the total costs of the duplicator will be lower than those of the author and therefore the duplicator will normally be able to sell the work at a lower price than the author. If this persisted, the author would never be able to recover creation costs and would eventually be driven out of business to the detriment of the nation concerned. In other words, the market possesses an inherent defect in the absence of the statutory copyright monopoly since there is no market mechanism for reimbursing the author for his creative efforts. The absence of this mechanism leads to an under-commitment of resources to the creative sector. Economists term this a "non optimal solution" since resources are not allocated in a socially optimal manner. It should be noted here that according to economic theory, one necessary condition for this social optimality to prevail is that the price of a good must equal the cost (at the margin) of producing it. Using this criteria then, when no copyright monopoly is present, social optimality is not achieved because creation costs are not accounted for by the market process; hence price tends to fall below marginal cost. The primary economic rationale for the granting of a copyright monopoly, therefore, is that it provides a mechanism by which creative individuals may be reimbursed for their efforts and by which, as a result, more resources will be committed to the creative sector of our economy.

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1. See, for example, "Microeconomic Theory: A Mathematical Approach", J.E. Henderson and R.E. Quandt, McGraw Hill (1971).

Unfortunately, while this statutory monopoly solves some problems, others are introduced. Firstly, when the copyright monopoly does subsist, social optimality is still not achieved because although creation costs will now be taken into account, this accounting occurs in the monopolist's pricing decision. In other words, creation costs will form part of what economists term a cost function for the monopolist. As a result, the copyright monopolist will, as usual, price his good above marginal cost and the condition for social optimality will again be violated, this time in such a way that the copyright owner is more than reimbursed for his creative efforts. It is difficult, if not impossible, to predict with theoretical rigour, whether this market defect (i.e. induced by the copyright monopoly) is more costly or less costly to society than the market failure which results when no copyright protection exists. Moreover, because of the complexity and magnitude of the mass of data that would be required to conduct such an analysis in any given case, it cannot be stated with certainty that the benefits resulting from copyright protection are worth the societal cost incurred. In view of this lack of information, it could be assumed that Canada, through the collective wisdom of her elected officials has therefore adopted copyright protection, together with its attendant costs, in the interest of protecting the rights of creative individuals and thereby contributing to our aforementioned national goals.

Two points require attention before proceeding. Firstly, it has been argued that there may be less costly means of achieving these benefits, especially when foreign dominance of Canadian copyright is taken into account. This point is considered in more detail below. Secondly, the granting of a statutory monopoly, in itself, does not necessarily guarantee that sufficient profits will accrue to the creator, especially in the case of copyright works. To illustrate this point, consider the case of the author who does enjoy copyright protection. Under this copyright, the author has the legal right to collect all the profits from the sale of his novel. However, the typical author usually does not possess the facilities necessary to get the work to market and must therefore deal with a publisher. This is a contractual process and will involve some bargaining since the publisher will want at least part of the profit to which the author was originally entitled by virtue of the copyright. This is quite normal since the publisher and other entrepreneurs involved will necessarily assume some risk in producing the work. The final distribution of the profits, however, will depend on the bargaining strengths of the author versus those of the publisher. For example, the author's bargaining strength is likely to depend on such factors as his popularity, past performances, the existence of collectives etc. as well as the fact that he alone possesses the copyright monopoly. Thus, although the author may be initially entitled to receive all the monopoly profits, the fact that he must bargain with others in order to market the work results in his receiving only a part of them. Note, however, that the fact that the author may not receive all of the monopoly profits in no way lessens the degree to which the market is distorted by the imposition of a legal monopoly.<sup>1</sup> The inefficiency of resource allocation still exists to the same degree but this misallocation is channeled to a different sector,

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1. Assumes other sectors are not less competitive than the books sector. The complexity of the theory of the second best precludes its discussion here. The intention is to demonstrate societal costs of monopoly rents flowing to foreigners, not to illustrate the difficulties imposed by second best theory.

namely, the publishing sector; hence the same market distortion prevails. Similar arguments can be made for other types of copyright material.

Summarizing to this point, the easy appropriability of creative works in the market results in an inherent defect in the market process. This defect leads to a distortion away from the optimum allocation of resources in the economy and is manifested by an insufficient commitment of resources to the 'creative' sector of the economy. The copyright monopoly attempts to resolve this problem by providing creative individuals with the legal framework for collecting copyright royalties while at the same time permitting the flexibility for other market forces (such as the popularity of the work in the market) to play their respective roles. In that sense the intervention is a minimum one. Indeed, if it were deemed desirable, it would be possible to intervene further to strengthen the position of the creator, for example, by lengthening the term of protection, setting the royalty rate artificially higher than the market rate etc. However, this policy direction is generally rejected in what follows, as it was in both the Economic Council Report and in the Ilesley Commission's Report. A number of reasons led to this conclusion.

The first of these reasons has to do with the fact that most of copyright royalties generated in Canada flow to foreigners. This gives rise to additional societal costs which have not, to this point been discussed. It is important here to draw the distinction between these different types of societal costs. The preceding discussion dealt only with the cost of resource misallocation which is characteristic of any monopoly and which consists of what economists term a "lost consumers' surplus".<sup>1</sup> That discussion took no account of flows between different economies and monopoly profits were assumed to remain within the economy where they were earned.

Since monopoly profits remained within the economy where they were earned, they did not represent a societal cost in themselves. However, if, as is the case for Canada, some, or most, of the monopoly profits are earned in one economy and flow to some other economy, then the monopoly profits themselves are a cost to the society in which they are earned. In Canada then, where most copyright royalties are earned by foreigners, society must bear both the cost of resource misallocation (lost consumers' surplus) as well as the cost of monopoly profits flowing to foreigners. (In that fraction of cases where Canadians are the holders of the copyright, only resource misallocative effects arise). In principle, a reduction of societal costs could be achieved by restricting or legislating against monopoly profits flowing to foreigners. However in the case of convention material, this option is precluded by Canada's adherence to international conventions which stipulate that domestic copyright protection cannot discriminate between nationals and foreigners. Hence any policy which resulted in a reduction in monopolistic royalties to foreigners would result in a similar reduction to Canadian copyright holders. Were Canada able to reverse her

1. Lost consumers surplus refers to a social welfare loss which accompanies monopolistic market segments. The reference in footnote 1, page 34, contains a detailed discussion.

present severe trade deficit in copyright material, however, she would enjoy a net societal gain from monopoly profits imported from foreign countries. (i.e. were this deemed desirable). This may explain why some countries having a large trade surplus in copyright material have aggressively pursued policies designed to strengthen international copyright law.

However, no such reversal in Canada's trade position appears imminent and this is one reason why the Economic Council did not recommend any increase in the general levels of copyright protection.

On the other hand this paper distinguishes between material protected by the copyright conventions and that which is not.

In the case of non-convention material, legislating against monopoly profits flowing to foreigners would not be at variance with the international conventions. The costs resulting from allocative inefficiencies would, however, still exist and would be borne by Canadians purchasing products protected by copyright.

A second reason for pursuing the above policy direction is that a range of more selective policies already exists to assist authors and other creative individuals in Canada. These include: Canada Council grants, tariff regulations, the "Canadian content" regulations of the CRTC, Bill C-58 which will prevent the tax deduction of advertising placed on US Television stations, Canadian content regulations for magazines, and various other provincial programs which are currently available. These policies have done much to assist the creative individuals and many of the areas subject to copyright protection in Canada.

One example is the impact which Canadian content broadcasting regulations have had on the amount of copyright royalties which Canadian composers receive as compared to foreigners. After the introduction of these regulations in 1971, the amount of copyright royalties which Canadian composers and lyricists received from CAPAC,<sup>1</sup> doubled as a fraction of all royalties which CAPAC collected. Similarly the amount of royalties flowing directly to foreigners decreased during this period.

A second example is the "major impact"<sup>2</sup> these policies have had in expanding the Canadian record industry. Given the effectiveness and flexibility of these selective policies on the one hand together with the constraints of international copyright conventions on the other, it was felt that cultural goals could best be pursued by other means than the strengthening of copyright protection for convention works.

Finally, and perhaps most important, is the fact that government policy must reflect the public interest as a whole rather than that of any individual sector. While the copyright monopoly improves the position of creative individuals, and thereby contributes to the development of such stated goals as the development of an indigenous Canadian culture, it has adverse effects on other sectors. For example, it has already been stressed that any monopoly tends to increase the price which consumers pay for the monopolized good and also results in less

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1. Composers, Authors and Publishers Association of Canada.

2. Sector analysis: "The Record Industry in Ontario" P. Klopchic, Ministry of Industry & Tourism, Government of Ontario 1976.

of that good being produced. This adversely affects the consumer, since he pays a higher price for the good. Moreover, the copyright monopoly tends to impede the velocity and efficiency with which information and goods are exchanged between various members of the society, an issue which was dealt with extensively by the Economic Council in its Report.

Hence, the revised act must strike a balance which ensures the continuing availability of sufficient creative efforts to meet cultural objectives while at the same time provides low cost access to information and creative works in such a way that the overall public interest is served. The policies recommended in subsequent parts of this Paper attempt to achieve this balance. The public debate which will follow this Paper will reveal whether this balance has been struck or whether this Paper has been excessively narrow in its precepts.

PART III

In Part III, the general principles discussed in Part I are applied to the various proposals put forward for the revision of the copyright law. Specifically, Part III examines the separate elements of copyright law, defines the issues, discusses them, and then makes recommendations for their solution. This comprehensive examination also encompasses issues which, although not raised in any submission to the Department, were nevertheless considered important. Suggestions for technical improvements and adjustments are made in Part III as well.

The first broad classification discussed is that of material protected by the international copyright conventions: which works are included, the criteria established for their protection, the rights of authors, the length of the term of protection, ownership of copyright, and various aspects affecting the exercise of such ownership.

Secondly, there follows a consideration of that material not protected by the international copyright conventions: sound recordings, broadcasts, computer programs, published editions, and performances by performers.

Thirdly, consideration is given to other forms of "rights", which could attach to existing protected subject matter or which could attach to products of technological development: public lending right, droit de suite, domaine public payant, use of material in information storage and retrieval systems, and operation of cable systems.

Fourthly, Part III examines exceptions to copyright protection, both in terms of the exceptions provided in the present Act and in terms of possible additional exceptions which might be provided in any new Act.

Then, infringement and remedies for infringement of copyright are discussed; and finally, there is a discussion of importation of copyright material into Canada.

I MATERIAL PROTECTED BY INTERNATIONAL COPYRIGHT CONVENTIONS

In Part I a distinction was drawn between the copyright material required to be protected under the copyright conventions and that which is not.<sup>1</sup> Convention material deals with the classic characterization of material protected by copyright: original works. These are further divided into literary, dramatic, musical, artistic and cinematographic works.

It is these "original works" that the Berne Convention generally seeks to protect. The laws of member countries usually reflect convention responsibilities by according protection to original

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1. see p 21, above.

works of a literary, dramatic, musical or artistic nature. The Universal Copyright Convention seeks to protect only "literary, scientific and artistic works". No mention is made of originality.

While subject matter other than literary, dramatic, musical or artistic works may also be protected, they are not usually considered to be original works. "Original", as applied to protected works, has come to mean that the work must originate with its creator who, in its production, applies his skill, judgement, labour and learning.

First it is proposed to look at literary, dramatic, musical and artistic works, not only with respect to their eligibility for protection and their definition in the traditional categories mentioned above, but also with respect to the rights that are attached to them. Secondly, the term of protection for original works is considered, followed by a discussion of ownership of copyright. Finally, cinematographic works and their protection by copyright are dealt with.

#### LITERARY, DRAMATIC, MUSICAL AND ARTISTIC WORKS

##### A CRITERIA FOR DETERMINING ELIGIBILITY OF WORKS FOR PROTECTION

###### 1. Fixation

A present criterion of protection is that of "fixation". Case law has decided that copyright subsists only in works that are "expressed ... in some material form, capable of identification and having a more or less permanent endurance".<sup>1</sup>

From a practical point of view, it is difficult to prove the existence of 'unfixed works'. Indeed, it is indisputable that the law can only protect what is ascertainable and, therefore, that fixation should remain a requirement for protection. Indeed, this requirement reinforces the principle that copyright protects a particular form of expression, not ideas.

With respect to the present Canadian Act, however, fixation as a criterion of eligibility to protection raises two problems: they result from the new technology involved in the recording of musical works and lectures.

Firstly, section 2 of the Act defines "musical work" as

any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.

This limits protection to music graphically reproduced. The definition does not encompass a tune improvised and simultaneously recorded on tape. A wider definition should be sought, as one authority states:

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1. Canadian Admiral Corporation Ltd. v Rediffusion Inc. et al (1954) Ex. C.R. 382; 14 Fox Pat. C. 114; 20 C.P.R. 75.

It is submitted that the subject matter of copyright, in the case of music, is not any graphic or other representation, but the actual tune and that the recording is required, not to create a protectable work, but to afford permanent evidence of the nature of the work. This is of particular importance in relation to much of the modern "pop" type music which is played straight onto tapes without having first been written down.<sup>1</sup>

The traditional method of musical notation, "sheet music", is alone implicit in the present definition of "musical work". This method has changed and new forms of musical notation have been, and are being devised. Some of the methods discard, or disregard completely, the concepts of written melody and/or harmony and their combination.

It is, of course, the principle of fixation per se which must be retained, and not any particular means of fixation or reproduction. Accordingly, the new Act should provide for new methods of fixation and grant protection to works fixed by such methods.

Secondly, the protection of lectures requires elaboration. By s 2 of the present Act, "lecture" includes addresses, speeches and sermons. The rights are those accorded to a literary work but only if the lecture is fixed in print or in writing prior to delivery. The lecture may also be protected if given from extensive notes.

The Ilsley Commission pointed out that it is uncertain whether a person delivering an extemporaneous speech has copyright therein and recommended that a "speech delivered in public be treated as a literary work even if it is not delivered from notes, provided it is, simultaneously with delivery, reduced to writing or some other material form".<sup>2</sup>

In the views expressed to the Department, it was urged that any new Act include speeches, interviews, and lectures, whether or not they exist in written form, and that they be protected whether fixed or not in order to include interviews and discussions on television and radio.

Considering the number of lectures, speeches, addresses and sermons that are delivered yearly, there has arisen remarkably little litigation. Apparently, there is little, if any, commercial value in such "works". However, in the USA, the use of recording devices has resulted in commercial exploitation of speeches of certain public figures. This practice has given rise to litigation in other jurisdictions as well, based, at least in part, on copyright.

While the Canadian law presently requires fixation as a condition of protection, that is not to say fixation need be in writing. As with musical works, prior fixation of a lecture by means of a sound

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1. Copinger, op cit, p 78.

2. Ilsley Report, op cit, p 55.

recording could be accepted as equally binding in law as writing or notation.

*RECOMMENDATIONS:*

1. *That fixation be a mandatory requirement of protection,*
2. *That the definition of fixation allow for any means capable of capturing the work fixed thereby.*

2. Originality

Section 4(1) of the Canadian Copyright Act states that: "copyright subsists in every otherwise qualified original, literary, dramatic, musical and artistic work." The ambit of protection is further defined in s 2 as including "every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression."

The Berne Convention (Rome Text, to which Canada adheres) does not, in the enumeration of protected works, specifically require originality, although it is an implied criterion of protection. Article 2(2), in referring to translations and adaptations of protected works, provides for their protection as "original works".

Article 2(3) provides that member countries are "bound" to protect such works. Similarly, Article 14 characterizes certain films as being "original" works. The Universal Copyright Convention has no requirement of originality.

The originality required by the present Copyright Act relates to the expression of thought and not to the originality of ideas or to the novelty of the work as understood, for example, under patent law. It is essential to appreciate that a copyright owner has no monopoly over the ideas expressed, and that others are at liberty to produce the same results, provided they do so independently and do not copy the original work. Further, no standards for originality exist. It is now settled law that the work, to be protected, must originate with the author, utilizing a substantial degree of skill, industry or experience, and must not be copied. There is no requirement as to original thought.

It is the result of independent creation that the law protects. Therefore, while translations, adaptations and compilations lack originality, they are nevertheless the result of a new handling. They involve independent work involving personal labour and are therefore protected as original works. Similarly, any work in the public domain which has been the subject of a new arrangement through the efforts of an author, is also original with respect to the arrangement.

In revising their laws, most common law countries have followed the system of requiring originality only with respect to literary, artistic, dramatic, and musical works. Sound recordings and films are not considered "original works" since they themselves incorporate original subject matter. That is, copyright in films and sound recordings is ancillary to the rights of the authors whose original works are embodied in the audiovisual material. Copyright in the latter is generally considered a separate and independent right.

As no change in existing law is contemplated, it being considered that a specific definition of "original" in any new Act might lead to interpretative difficulties in view of existing voluminous case law, no recommendation is made.

### 3. Qualified Persons

It is important to determine who are to be the beneficiaries of copyright protection under the revised legislation. There are two alternatives: that all creators be protected, regardless of nationality or origin; or that protection be limited to Canadian authors, residents, those contemplated by the conventions to which Canada adheres and those entitled through Ministerial extension of the Act.

The Economic Council made no specific recommendations regarding persons qualified for copyright protection, but in discussing the net importer status of Canada it was of the apparent view that the present imbalance should not be increased. It also stated that access to foreign information was "crucially important" to Canada, "consistent with Canadian consumers paying a fair share of a reasonable incentive to authors and other copyright holders and assignees the world over".<sup>1</sup>

Consistent with Canada's international commitments, the present Copyright Act does provide protection to certain foreign authors. Section 4(1) of the Act reads:

Subject to this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in Schedule II, or resident within Her Majesty's Realms and Territories; and if, in the case of a published work, the work was first published within her Majesty's Realms and Territories or in such foreign country; but in no other works, except so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

This section has been interpreted in various ways and there is wide disagreement about its meaning.

1. Economic Council Report, op cit, p 144. Presumably, in using the words "the world over", the Council did so figuratively and not literally, in view of its earlier statement (p 43) that:

Canada is likely, for instance, to have an interest in adhering to international conventions at less than the maximum level of protection available to member countries. Canada may well wish to retain its freedom to maintain patent, copyright and design protection on a shorter-term and less-extensive basis than other countries, and to issue compulsory licences more often than they do.

The Act refers to those countries that have "adhered to the Convention and the Additional Protocol thereto set out in Schedule II". That Schedule reproduces the Berlin Text of the Berne Convention (1908). Literally speaking, it appears that countries which have only adhered to the Rome Text (1928) of the Convention probably are excluded, even though Canada ratified that Text in 1931 and reproduced it in Schedule III of the Copyright Act. It would appear that countries adhering to later Texts of the Berne Convention are also excluded, as there is no reference to them in the Act.

Further, section 4(1) of the Act may be interpreted as being at variance with a Berne requirement: Article 6(1) provides that, where an author is not a national of a Union country but first publishes in a Union country, he is to be granted convention treatment and the same rights as native authors in the country of first publication. Conflicts of views also exist as to whether or not the "and" following the semi-colon in the last part of s 4(1) should be read disjunctively or conjunctively. If read conjunctively the section is at variance with the Berne Text. It would appear that the section should be clarified to ensure an interpretation which meets Canada's international commitments.

In addition, since Article 11(1) of the UCC requires protection of published works of Convention nationals, irrespective of the country of first publication, a change also appears to be required in s 4(1) to reflect that responsibility. Similarly, it follows that protection should be extended to the works of non-convention nationals first published in a Convention country.

Various briefs received have pointed out the technical and legal difficulties created by the present s 4 and the view has been expressed that Canada has not implemented the requirements of the Rome Text.

It has been suggested that present s 4 also be amended to reflect Article 3 of the Stockholm (now Paris) Text of the Berne Convention so that habitual residents of a country of the Berne Union are accorded the same treatment as nationals of such a country. To adopt that provision and treat habitual residents of union countries as Canadian nationals would be a step towards protecting more authors than is presently required of Canada by international commitments.

In re-wording the Act so that it more clearly meets the requirements of the conventions, it might also be useful to define those "juridical persons" that should come under the ambit of copyright protection, since copyright can also vest in bodies corporate. With the appropriate modifications necessary to encompass such persons, the beneficiaries of Canadian copyright legislation would then be: Canadians, and those domiciled or resident in Canada,<sup>1</sup> those foreign authors and owners whose works require protection under the conventions to which Canada adheres, and nationals of those countries to which the Act may from time to time extend.

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1. As recommended in the Ilsley Report, op cit, p 39.

**RECOMMENDATIONS:**

That the protection of the Canadian Act be provided to the following "qualified persons":

**1. individuals:**

- a) Canadian nationals;
- b) those domiciled or resident in Canada;
- c) non-nationals whose works require protection under the Conventions to which Canada adheres;
- d) nationals of those countries to which the Act may from time to time extend.

**2. juridical persons:**

- a) bodies incorporated in Canada;
- b) bodies incorporated in countries signatories to the Conventions to which Canada adheres;
- c) bodies incorporated in countries to which the Act may from time to time extend;
- d) organizations (e.g.: UN and specialized agencies) to be named in appropriate orders from time to time.

**4. Published and Unpublished Works**

Determining the country of origin of a work, which depends on the place of first publication, is of great importance in international copyright. The protection accorded to works of foreign authorship is governed by the provisions of the treaties to which Canada subscribes. These treaties differentiate protection on the basis of publication, either between published and unpublished works or between works published in member and non-member countries. Thus, whether and where a work is published have important consequences in international copyright.

Under Article 4 of the Rome Text of the Berne Convention, the country of origin for unpublished works is the country to which the author belongs and for published works, the country of first publication. Where a work is published simultaneously in a non-Union country and in a Union country, the Union country is considered the country of origin. "Simultaneous publication" is not defined under the Rome Text. In later Texts, it is defined as a subsequent publication occurring within 30 days. The UCC makes no provision with respect to simultaneous publication. The present Copyright Act provides a period of 14 days and there appears to be no advantage in retaining a period which is shorter than the present international norm. To provide a period of 30 days would be in the interests of international comity.

The following are examples of the importance of publication under the Berne Convention: authors who are not nationals of a Union country are not guaranteed any rights under the convention in Union countries with respect to unpublished works; where the same authors first publish in a Union country, they enjoy national treatment in that country and convention rights in all other Union countries; authors who first publish in a non-Union country are guaranteed no rights after publication, regardless of nationality, residence or domicile.

With respect to the eligibility of a work for protection under the Universal Copyright Convention, "publication" plays a role only if the work's author is not a national of a contracting country. If he is a national, the work is protected whether published or not, and if published, irrespective of the place of first publication. But, if the author is not a national of a contracting country, the Convention applies only if the work is a published work and has been first published in a contracting country.

"Publication", then is a determinant of the treatment contracting countries must accord to works encompassed by a convention. Published works must be accorded the same protection as domestic law accords to works of domestic authors first published in the country in which protection is sought; and unpublished works must be given the protection accorded to unpublished works of nationals of the country in which protection is sought.

The difficulties of harmonizing the provisions of the present Act with Canada's international commitments have been discussed in the section dealing with "qualified persons". In short, the Act should be changed to meet the requirements of the Texts of the conventions to which Canada has adhered. It is clear that, as it now stands, s 4(1) does not adequately fulfill Canada's international obligations. The section should not make the protection of published works depend on meeting the requirements of both published and unpublished works.

In meeting those requirements, it follows that any new Act should provide, in the interests of clarity and certainty:

1. that unpublished works be protected only if created by qualified persons;
2. that published works be protected only if
  - a) first published in Canada; or
  - b) first published in a country signatory to a convention to which Canada has adhered; or
  - c) first published in a country to which the Act extends; or
  - d) created by Canadians or by nationals of a country that has adhered to the 1952 Text of the Universal Copyright Convention, irrespective of country of first publication.

*RECOMMENDATIONS:*

1. *That Canada not go beyond its present international commitments and protect works in situations not envisaged by the conventions.*
2. *That simultaneous publication be defined as a subsequent publication occurring within 30 days of first publication.*

## B CATEGORIES OF WORKS AND DEFINITIONS

Copyright, at the international level, is traditionally said to protect "literary, dramatic, musical and artistic works". These words were used to illustrate differences and do not denote strict standards of definition other than what may be eventually accorded them in the domestic law of each country.

In Canada, when the present Act was amended in 1931 to reflect the Rome Text of the Berne Convention, the Convention terminology of "literary, dramatic, musical and artistic works", was adopted. No exact definitions were provided, except for "musical works" which were closely defined. Books, for example, might be considered literary, dramatic or even musical works. Indeed, the categories of works have been liberally construed. E.g. for copyright purposes, "literary" includes directories, examination papers and railway time-tables.

It appears no longer feasible to have a single definition of copyright in relation to all protected material. Categorization is therefore necessary to determine the protected material to be included within each group.

While the categories have been liberally interpreted, they should include works easily assimilated to that particular category. Thus, "literary" should mean something written and not include "maps, charts and plans" as it presently does. These latter works are more properly in the nature of artistic works. Lectures, however, should be assimilated with literary works.

Similarly, "dramatic" should not include "motion picture film" or "videotape" but should include those original works whose main purpose is their performance, such as choreography.

Mechanical contrivances for the reproduction of sounds should not be assimilated with literary, dramatic or musical works, according to the nature of the sounds embodied, as is now the case by virtue of s 4(3). If, as is recommended, mechanical contrivances warrant copyright protection, the protection should be specifically tailored to its object, in a separate category of protected material. Mechanical contrivances cannot be considered works of the same order as those that the conventions intended to bring under the broad definitions of literary, dramatic, musical and artistic works.

On the other hand, as was said under the Fixation section of this Paper,<sup>1</sup> the definition of "musical work" should be broadened to include contemporary forms of music. These new forms of music may not be protected under the present Act which restrictively defines "musical works" as "any combination of melody and harmony". For reasons that will become clear during the discussion of compulsory licensing for the mechanical reproduction of sounds, the definition of musical works should be broad enough to encompass words associated with the music.

Artistic works are a different form of expression of the intellect; examples are drawings, paintings, architectural works, sculpture,

1. See p 40, above.

engravings, photographs, lithographs, illustrations, geographical charts, plans, sketches, and plastic works (models).

Because of the terms used in the present Act, works of architecture and craftsmanship appear to be protected only where they have artistic merit. The Act refers to "architectural works of art" and "works of artistic craftsmanship". Undoubtedly, this terminology can create problems for the courts which have to decide on the quality and merit of works.<sup>1</sup> Another difficulty is that, with respect to architectural works of art, the present Act is probably at variance with the Berne Convention which creates the obligation to protect "works of architecture". This problem was identified by the Ilesley Commission which recommended that these works be protected irrespective of their artistic quality. Given the low degree of originality needed to warrant copyright protection, artistic works should not be subject to tests not applied to other works.

Photographs are now protected as "artistic works", by virtue of s 2 of the Act. They are defined as including "any work produced by any process analogous to photography". It was pointed out to the Department that the present definition of photograph is related to negatives, but photographs can now be produced other than by negatives and wet chemistry. Any new Act should therefore avoid restrictive definitions and reflect technological change.

*RECOMMENDATIONS:*

1. That the general categorization of literary, dramatic, musical and artistic works, be retained.
  2. That the categories be broadly defined, bearing the following in mind:
    - a) "literary works" should not include maps, charts or plans;
    - b) "musical works" should recognize the contemporary nature of these works, and any definition should encompass words associated with the music;
    - c) "dramatic works" should not include motion picture film or videotape, but should include choreography;
    - d) "artistic works"
      - (1) should be protected irrespective of artistic quality; to include maps, charts and plans;
      - (2) that the definition of photograph include any work expressed by a process analogous to photography.
  3. That mechanical contrivances be the subject of an independent category of other protected material.
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1. In Cuisenaire v South West Imports Ltd, (1968) 1 Ex. C.R. 4931, a set of rods for the purposes of teaching were held not to be a work of artistic craftsmanship as no craftsmanship was involved in the making, cutting, or colouring of them, nor were they artistic.

## C RIGHTS OF AUTHORS

1. Pecuniary Rights

The Copyright Act enumerates the rights of authors in s 3. That section is unduly complex in that the rights are not themselves defined, but are loosely described by being attached to specific categories of works. There is no better way to illustrate the complexity of this approach than to quote the entire section.

3.(1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and includes the sole right

- (a) to produce, reproduce, perform or publish any translation of the work;
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
- (d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;
- (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph, if the author has given such work an original character; but if such original character is absent the cinematographic production shall be protected as a photograph;
- (f) in case of any literary, dramatic, musical or artistic work, by radio communication; and to authorize any such acts as aforesaid.

A new Act could be more clear by giving definitions of the rights themselves and then stating whether or not that right attaches to a particular category of works. All the rights presently provided by s 3(1) could thus be regrouped under six broad headings: the rights to reproduce, to perform in public, to publish, to adapt, to broadcast and to authorize. In addition, a new right dealing with artistic works is discussed. It is under these headings, but with explicit reference to s 3(1), that the rights that a new Act should grant to authors of original works will be examined.

## (a) The right to reproduce

This right is the right to reproduce in any material form. In the copyright sense this means copying and, as reproduction may be carried out by making a recording or film of a work, hence the words

"in any material form". The Ilsley Report recommended the retention of the concept.<sup>1</sup> The recognition of an author's sole right to reproduce the work by such diverse means as mechanical contrivances, motion picture films and videotapes, is an underlying principle of the Copyright Act.

Furthermore, it is considered that any new definition of the right should retain the words "any substantial part". What constitutes "any substantial part", of course, is a question of fact.

It is of some interest that, in some jurisdictions, a right to distribute is provided as a right additional to that of reproduction. Clearly the function of distribution is implicit in the right of reproduction, and it should be left to contracts to settle the terms and conditions for distribution. There appears, therefore, no need to identify such a right specifically, apart from the broader right to reproduce.

Finally, the UK Act of 1956 could be followed with respect to the particular meaning of "reproduction" in terms of artistic works. In that Act, "reproduction" is defined as including reproductions of a two-dimensional work in three dimensions and vice-versa. Such a definition appears reasonable and would not be inconsistent with the recommendations of either the Ilsley Commission or the Economic Council.

#### (b) The right to perform in public

Section 2 of the present Canadian Act defines performance as being "any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication".

The meaning of the phrase "in public", in respect of a performance, has been frequently dealt with in the courts, and whether or not a performance in public is carried out is considered a question of fact.

It would not be wise to define the phrase in any new Act for that reason. The right, nevertheless, should remain, as it now is, the right to perform the work or any substantial part thereof in public.

Performance, however, should be redefined to reflect technological developments, taking into account the particular nature of certain works. Thus, a performance would include delivery in the case of lectures and similar works; it would also include, for any work, the presentation by wireless telegraph apparatus, by film, or by record.

#### (c) The right to publish

Under the present Act, the right to publish is not defined. However, "publication" is defined in s 3 as the "issue of copies to the public" and it would seem, therefore, that "the right to publish" should be defined as the right to effect a publication.

Publication is an act that determines the existence, length of term and extent of protection. Before publication, an author has absolute

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1. Ilsley Report, op cit, p 41.

rights and control over his work, but once that work is published, protection is subject to numerous exceptions and runs for a limited time.<sup>1</sup>

The act of publication occurs when an author publishes his work, i.e. when he makes copies of it available to the public. Works which are exploited primarily by their performance are, of course, not considered published per se, as copies of the work are not being made available to the public.

Under both the Berne and UCC Conventions, each country is free to define publication in relation to works of its own nationals, and those works first published in its territory. It would, however, greatly add to the confusion to have one definition for domestic works and another definition for foreign works. As the Ilsley Commission said:

Canada should not, it seems to us, get too far from traditional and accepted definitions of publication in copyright law - or from definitions that are used in international conventions. We do not think that the present definition of publication in the Act should be substantially changed.<sup>2</sup>

Consequently, the present concept of publication should be retained and should not encompass those activities by which a work may be communicated to the public other than by copies of that work being made available. Such communications could for example be performances, broadcasts, the exhibition of an artistic work or, with respect to works of architecture, the construction of a building. Similarly, distribution of representations of a building would not "publish" that building.

A change should be made with respect to the right to publish. Presently, the right applies only to unpublished works but not, apparently, to works already published. There is no reason to so limit the right. The author should be able to authorize all publishing of his work, initially and subsequently.

#### (d) The right to adapt

Under the present Act, the right to adapt is explicitly provided only with respect to traditional works being adapted to cinematograph.<sup>3</sup> However, the same principle is applicable when it refers to the right to convert a dramatic work into a non-dramatic work or vice-versa;<sup>4</sup> and s 3(1)(a) identifies the sole right to "produce, reproduce, perform or publish any translation of the work".

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1. As will become evident in the discussion of Term (p 59) and Exceptions to Protection (p 144).
  2. Ilsley Report, op cit, p 34.
  3. Copyright Act, s 3(1)(e).
  4. Copyright Act, s 3(1)(b) and s 3(1)(c).

These present rights need not be changed. It appears, however, that the words "to adapt" are sufficiently generic to encompass all the above. The "right to adapt" might further be defined to include the making of a version in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, newspaper, magazine or similar periodical.

(e) The right to broadcast<sup>1</sup>

Section 3(1)(f) presently identifies the sole right to communicate any literary, dramatic, musical or artistic work by radio communication. The section was made part of the law to meet the requirements of the Berne Convention.<sup>2</sup>

After studying the requirements of that Convention, the Ilesley Commission considered that Article 2 (bis) envisaged only those works capable of communication by sound.

Although it may certainly be said that a 1924 statute could not have anticipated the advent of television, one still queries how an artistic work could be communicated by sound. The Broadcasting Act today properly defines radiocommunication as "any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide".<sup>3</sup> To bring consistency to the two statutes it is suggested that the present right be defined to ensure that "communication" may be made through radio or television.

(f) The right to exhibit an artistic work in public

The right of public exhibition of an artistic work is not an exclusive right provided by the present Act.

The exhibition of an artistic work is of course not a performance of that work. However, it would seem that the same arguments warrant the granting of an exhibition right in artistic works.

Indeed, the exhibition of artistic works, particularly commercial exhibitions, where admission fees are charged, are obvious exploitations of the fruits of another person's labour. In all fairness an artist should share in the proceeds of an exploitation which depends entirely on his having created the artistic work in question.

(g) The right to "authorize"

Presently, it is an infringement to authorize anyone, without authority, to exercise any of the exclusive rights reserved to authors.

Generally, whether authorization is given is a question of fact in each case. It is submitted the right should be retained.

1. Cable systems use of works is discussed under the heading of Cablecasting Rights, p 130, below.
2. cf. Berne Convention, Article II and Article II (bis).
3. Broadcasting Act, RSC 1970, c B-11, s 2.

**RECOMMENDATIONS:**

1. That the pecuniary rights of authors in respect of their literary, dramatic, musical and artistic works be reformulated as explicit rights in accordance with the methodology outlined.
2. That references to the rights attaching to subject matter other than literary, dramatic, musical and artistic works such as motion picture films, sound recordings, be deleted.
3. That to ensure clarity and certainty, the exclusive rights of authors in literary, dramatic, musical and artistic works, be formulated so as to provide that in respect of:
  - a) The right to reproduce: it include reproduction of a two dimensional work in three dimensions, or vice versa.
  - b) The right to perform in public: it include delivery in the case of lectures and similar works; and the presentation of a work by the operation of wireless telegraph apparatus, exhibition of a film, playing of a record or by any other means.
  - c) The right to publish: it include making copies of any published work available to the public.
  - d) The right to adapt: it include the right to make a version in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, newspaper, magazine or similar periodical.
  - e) The right to broadcast: the definition of radiocommunication be that used in the Broadcasting Act.
  - f) The right to authorize: that it mean the right to authorize the exercising of any of the rights reserved to authors.
4. That any new Act provide for a specific right to exhibit an artistic work in public.

**2. Moral Rights**

In addition to his pecuniary rights, an author has interests which relate to his personality. Generally referred to as "moral rights", they are incorporated into s 12(7) of the present Copyright Act, which reads:

Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation.

The section is in keeping with Article 6 (bis) of the Berne Convention (Rome) which recognizes certain moral rights, i.e. those of paternity and integrity of the work:

(1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

That Article represents the generally acceptable international limit of the scope of such rights, particularly in common law countries. It should be noted that the Canadian Act gives a right to "restrain", that is by injunction, whereas the Berne Convention designates a right to "object".

The moral right of an author is also referred to in Article 11 (bis) of the Convention dealing with broadcasting. Each country is permitted to determine the conditions of exercising the broadcasting right with the reservation that such conditions "shall not in any case prejudice the moral right ...".

The UCC makes no specific provisions for moral rights. It does, however, in Article 5, provide for certain rights which could be considered to be of a "moral" character. Thus, where a translation of a work has been made, the integrity of the original text must be respected, the original title and the name of the author must appear on all copies of the published translation, and no compulsory licence to translate may arise with respect to a work that has been withdrawn from circulation by its author.

While the Berne Convention (Rome) seeks to protect two rights (paternity and integrity), it is silent on other possible rights on which, presumably, it was impossible to achieve agreement. Further, implementation is left to national legislation, thus indicating the substantially watered-down nature of the Text which was finally adopted. The original 1928 Italian proposal guarded against anything "prejudicial to the moral interest".

Moral rights were extended by the Brussels Text of the Berne Convention (1948) permitting the author to have, during his lifetime, the right to paternity and the right to object to any distortion "or any other action in relation to the said work" which would be prejudicial to his honour or reputation. Optionally, the rights could be maintained until the expiry of copyright. In the Stockholm Text (1967), the right of paternity was maintained and the integrity right enlarged to cover modification, "or other derogatory action in relation to the said work" prejudicial to the author's honour or reputation. Furthermore, the grant of the rights was made compulsory until the expiration of the full term of protection for pecuniary rights.

It is to be noted that Article 6 (bis) (2) of the Stockholm Text provides, however, that countries whose legislation at the time of accession, does not protect those rights covered by Article 6 (bis) (1) after the death of the author may provide that some of the rights cease to be maintained after his death.

In considering the extent to which moral rights should be provided for in any new Act, it is necessary to keep in mind that the Berne Convention (Rome) represents for Canada the minimum obligatory protection. Moreover, it is emphasized that, although "moral rights" have been distinguished from the pecuniary rights attaching to copyright, the distinction is not necessarily well-defined. Moral rights do possess pecuniary value as, for example, the reputation of an artist can influence the exploitation and price of his work.

Recognizing that an author's reputation and popularity affect his bargaining position, the Economic Council stated that s 12(7) of the Canadian Act should be made as clear and unambiguous as possible.<sup>1</sup>

The Council, following the example of the Iilsley Commission and, in England, the Gregory Committee, limited a priori any increase in the scope of moral rights on the grounds that it should be through contract, rather than by statutory provision, that the variety of situations envisaged should be dealt with.

The issues, then, are whether moral rights should be codified, and whether they should be extended beyond the present Canadian minimum, quite apart from any convention requirements.<sup>2</sup>

Canadian creators are naturally very much in favour of an extension of moral rights. During the consultation process, strong representations were made to the Department advocating the retention and expansion of moral rights as being just as important as pecuniary rights. Attention was called to the very limited protection provided against mutilation, changes, vandalism and deterioration of works. Demands were made for the provision of extensive remedies such as damages, injunctions and penalties for infringement of moral rights. The submissions stressed the need for the recognition of moral rights as a fundamental element of copyright.

It is submitted that moral rights are indeed of equal if not greater importance than pecuniary rights. In Part I of this Paper it was stressed that the law should reflect a proper concern for matters of personality. Indeed, recognition of the obligation imposed by the Berne Convention with respect to moral rights is an empty gesture without the provision of an adequate means of enforcing them.

It is clear that moral rights of authors should be explicitly codified in any new Copyright Act. The Economic Council recognized the need for clarifications and elaboration of the rights, the Iilsley Commis-

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1. Economic Council Report, op cit, p 156.

2. In fact, it may be said that the present s 12(7) already goes beyond convention requirements insofar as it provides for a right to restrain rather than for a right to object.

sion made recommendations respecting what is essentially, passing-off or alteration;<sup>1</sup> the private sector generally supports the maintenance and elaboration of the concept; the moral rights doctrine is espoused by those embracing the personality philosophy of copyright; and common law principles are uncertain, particularly in Quebec. It now remains to examine to what degree codification should be effected.

Under Article 6 of the French Copyright Act, moral rights are divided into the author's rights to enjoy respect for his name, his authorship and his work. As the French Act does not further define these three broad categories, French courts are left with the task of determining the parameters of each category. Those courts, however, have had much experience with the philosophy of moral rights and, even before the passage of the Act, had already clarified and circumscribed the concept. Therefore, unnecessary litigation as well as legal uncertainty might be avoided by including in the new Copyright Act a detailed definition of these rights.

Thus, it should be specified in the Canadian Act that the author's right to enjoy respect for his authorship includes, beyond his right to be identified on each copy of his work,<sup>2</sup> his right to restrain the circulation of copies of the work under his real name where he has chosen to use a pseudonym or to remain anonymous. In addition, as pointed out by the Ilsley Commission, the right should also include the right to restrain false attribution of authorship. Under the present Act, it is doubtful that an author has a remedy against someone falsely identifying him as the author of a work. It would be reasonable to broaden moral rights protection by taking into account such situations which could clearly be prejudicial to an author's honour or reputation.

Similarly, the author's right to enjoy respect for his work (the so-called "right of integrity") should be clearly defined. Presently, the author's right is strictly "to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation".<sup>3</sup> Unfortunately, a number of cases have recently arisen, primarily in Quebec, where artistic works were mutilated, modified or dealt with in ways that were not obviously prejudicial to the creator's honour or reputation, although the modifications resulted in works that the artists could no longer recognize as their own: for example, sculptures created to be positioned in a certain precise way in a particular environment.<sup>4</sup> One can also imagine the gratuitous modification of a work of art by its physical owner, without the creator's consent.<sup>5</sup>

1. See Ilsley Report, op cit, p 118. The Commission was mostly concerned with situations involving false attribution of authorship.
2. Section 26(2) in the present Act does provide for a summary remedy against the unauthorized change or suppression of the title or the author's name on a dramatic, operatic or musical work only.
3. Copyright Act, s 12(7).
4. See Peter Gnass et al v Cité d'Alma et al. Cour Supérieure, District de Roberval, No A-158, 23 nov. 1973.
5. Physical ownership does not equal copyright ownership.

Considering the nature of those works which readily lend themselves to modification, and considering that their value resides in their being unique, it seems reasonable that they should be protected against modification, irrespective of whether such modification is prejudicial to the creator's honour or reputation. Respect for the integrity of an artistic work should not, however, go as far as requiring its owner to maintain and preserve the work. On the other hand, if the moral right is to extend beyond the protection of an artist's "honour and reputation", as is suggested, it follows that the author himself should not have any right to modify or destroy a work after he has parted with possession of it.

With respect to works that are performed in public, it has been suggested that prejudicial mutilations and distortions may result from poor technical conditions under which a performance is given and, therefore, the author should have a moral right to insist that his work be performed under the best possible technical conditions. It would seem, however, that the application of such a provision would rely on such subjective criteria as to be unapplicable. Therefore it will not be recommended to have this type of situation covered by the Copyright Act. Rather these matters should be regulated through contractual agreements.

The author's right to enjoy respect for his name is the third category of moral rights that needs clarification. The present Act, of course, deals only with distortions, mutilations or modifications of the protected work. However, certain uses to which literary, dramatic, musical or artistic works are put can create situations where an author's honour or reputation may be impugned without the work having been distorted, mutilated or modified: for example, the use of a musical work in commercial advertising. The Brussels Text (1948) of the Berne Convention covers this situation by the addition of the words "or any other action in relation to the said work" after the words "to object to any distortion, mutilation or other alteration", in Article 6 (bis) dealing with moral rights. Although Canada has not ratified the Brussels Text the principle therein appears to be sound and there seems to be no reason why the new Canadian Act should not protect the honour and reputation of authors to this extent.

It should also be obvious that the honour and reputation of authors could be affected by the untimely publication of their works. Indeed, it has long been recognized, both in Canada and internationally, that the author's most sacred right is the right to publish. That right has already been discussed,<sup>1</sup> and there is little need to review that discussion in terms of moral rights. However, the right to publish carries with it moral rights concepts not yet recognized in Canada: the right to refrain from making the work available, and the right to stop publication, even to the extent of withdrawing the work from circulation.

Admittedly, such rights can have important economic consequences. If, as is recommended, these rights are provided for in the new Act, the wording should be explicit to avoid abuse of the new rights. For example, an author should bear the consequences of reversing his previous authorization to publish. If he decides to stop publication, he should be so allowed provided the publisher receives compensation; and if he wishes to withdraw

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1. See Pecuniary Rights, p 50, above.

his work from circulation, the author's right should be limited to his having the first option to buy back copies available for sale. A right to suspend all forms of utilization previously authorized has been provided in other jurisdictions; it is not recommended that the Canadian Act go as far as this.

The above represents the scope of the recommended moral rights. It remains to be determined how these rights should be exercised. Again, it is suggested that Canada can benefit from examining the French codification. Article 6 of the French Act states that the rights are attached to the person of the author, and that they are inalienable, but may be transmitted to his heirs or conferred on a third person by testamentary disposition. Undoubtedly, these are the correct principles: moral rights finding their roots in the author's honour and reputation should only be exercised by the author himself, or by those who legally claim to represent the continuation of the person of the author.

The French Act, however, goes on to say that the rights are "perpetual and "imprescriptible".<sup>1</sup> It is suggested that this is where the new Canadian Act should not follow the French example. Though the concept of an "imprescriptible" moral right is already present in our Act<sup>2</sup> and should be retained, there seems to be no reason to protect moral rights indefinitely. Indeed, the problems of perpetual copyright will be discussed under Term of Protection.<sup>3</sup> Furthermore, as was said in Part I, the new Act should harmonize moral and pecuniary rights and recognize them as the two constitutive elements of copyright. Therefore, it will be recommended that moral rights enjoy the same term of protection as pecuniary rights.

For similar reasons, infringement of a moral right should give rise to all the remedies provided for the infringement of a pecuniary right. Commenting on the present s 12(7), Dr Fox<sup>4</sup> said:

How the author is going to succeed in claiming authorship other than by shouting against the wind is not clear. The statute gives him the right to claim authorship and presumably he can establish that right in an action. But there, apparently, the remedy ceases. He can apparently obtain no damages; perhaps he can obtain an injunction but unless the injunction is directed to restraining the publication of the work without including the true author's name on the work, an injunction will do him little good. Damages can be obtained for breach of contract to credit an author with his work, whether that contract be express or implied, but there has so far been no case that held such a contract could in any case be implied other than a contract not to attribute the work to other than the author. Perhaps our legislators, in their wisdom, intended the author merely to have the right to publish his work, at his own expense, with his name on it.

1. The civil law concept of "prescription" is equivalent to limitations under common law.
2. Section 12(7) begins: "Independently of the author's copyright", meaning in this instance that the limitation on the bringing of an action for infringement (s 24) does not apply.
3. See p 59, below.
4. Fox, H.G.: The Canadian Law of Copyright and Industrial Designs, 2nd ed.; Carswell, Toronto, 1967; pp 615-616.

It is recalled that the Iilsley Commission also recognized the problem and recommended that all remedies, including damages but excluding criminal proceedings, be available to the wronged author.<sup>1</sup> The Economic Council, too, stated that s 12(7) should be elaborated and spelled-out,<sup>2</sup> perhaps indicating that it felt there should be a broadening of the available remedies.

*RECOMMENDATIONS:*

1. That the following moral rights be provided in Canadian Copyright law:
  - a) the author's right to enjoy respect for his authorship, including a right to restrain false attribution of authorship and a right to restrain the circulation of copies of the work under his real name where he has chosen to use a pseudonym or to remain anonymous;
  - b) the author's right to restrain any distortion, mutilation or other modification of his work, or any action in relation to the said work, which would be prejudicial to his honour or reputation;
  - c) the author's right to restrain any distortion, mutilation, modification or any other action in relation to the original of an artistic work in the nature of a sculpture, a painting, a drawing or an engraving;
  - d) as collaries to the right to publish: the author's right to stop a publication, despite previous authorization, provided that the publisher receives compensation; and a right, after publication, to withdraw the work from circulation by having the first option to buy back copies available for sale.
2. That moral rights be attached to the person of an author, but that they may be transmitted on the death of the author to his heirs or, through testamentary disposition, to a third party.
3. That the term of protection for moral rights be the same as for pecuniary rights, and accorded to original literary, dramatic, musical and artistic works.
4. That remedies for infringement of moral rights be the same as those granted for the protection of pecuniary rights, including injunction and damages.

D TERM OF PROTECTION

The term of copyright protection and the points of departure to measure its duration are the subject of this section.

1. See Iilsley Report, op cit, p 118.
2. See Economic Council Report, op cit, p 156.

The Economic Council recommended that "... there should be no lengthening of the basic term of copyright in Canada. The present term appears to give ample time for income to flow to copyright holders and their surviving dependents".<sup>2</sup> On the other hand, the Council characterized Canada as being a "net importer" of copyright and suggested that "Canada is likely, for instance, to have an interest in adhering to international conventions at less than the maximum level of protection available to member countries. Canada may well wish to retain its freedom to maintain ... copyright ... protection on a shorter-term and less extensive basis than other countries ..."<sup>3</sup>

#### 1. Works Published During the Author's Lifetime

By section 5 of the present Act, the general term of protection for published literary, dramatic and musical works is "life of the author and a period of 50 years after his death", except "as otherwise expressly provided". In respect of artistic works, the general term is life of the author and 50 years thereafter, regardless of whether the artistic work is published or not.<sup>4</sup>

The Ilsley Commission discussed term on the assumption that new copyright legislation would be enacted prior to Canada's ratification of the UCC, which would have allowed term to be based partly on the date of publication.<sup>5</sup> The recommendation made in respect of published original works was that protection should expire 56 years after the year of first publication, or at the death of the author, whichever was later.

Several reasons were given for the Ilsley proposal: (1) it was generally desirable to strengthen term; (2) if term began to run from the date of publication, elderly and youthful authors would be treated more equally than under a regime where future length of life is also relevant; (3) if term were based on the date of publication, the date of expiry could be determined more easily; (4) it was desirable that term in Canada correspond "as closely as possible, with the term of copyright in the United States",<sup>6</sup> and in any event, not be longer.

However, the Commission noted that Art. 7 (bis) of the Rome Text (1928) of the Berne Convention regarding joint authors, as in s 8

1. Given as life plus 50 years, Economic Council Report, op cit, p 132.
2. idem, p 148
3. idem, p 43 (Emphasis added)
4. There are two exceptions to this principle: engravings and photographs. They are discussed separately.
5. Article 4 (2); this option is no longer available as Canada joined the Convention without having amended its Act.
6. Ilsley Report, op cit, p 21. However the new US law, effective January 1, 1978, provides a term of life plus 50 years, i.e. the Berne Convention scheme.

of the Act,<sup>1</sup> would make it impossible to enact a term dating from publication in that case. The feeling was that what could not be done in respect of joint authors should not be done in respect of sole authors. The Commission noted that it "would not be permissible to deprive any author of protection during his lifetime".<sup>2</sup>

In the international conventions, provisions for duration of protection are not uniform. In recognition of the fact that Berne Union countries have not uniformly adopted the term of life plus 50 years, Article 7(2) and (3) of the Rome Text leaves the regulation of term to each country.<sup>3</sup> Furthermore, Article 7(2) of the Rome Text imposes a comparison of terms and requires that no foreign work receive longer protection than it receives in its "country of origin".<sup>4</sup> This "rule of the shorter term" permits Berne countries to reduce the term given to convention works to that given in the country of origin of the work. A reduction by Canada, could invite the application of the rule by Berne countries.<sup>5</sup>

In the UCC, Art. 4(2) provides that the minimum term of protection is life of the author plus 25 years, except with respect to works where the term of protection is calculated from the date of first publication.

In most countries the general term runs from the death of the author, for a period of 50 years; in a few countries the relevant death is that of the surviving spouse. The "life measurement" now seems to be enshrined in international conventions and even the USA in its recently adopted law proposes the introduction of the life plus 50 years formula.

There are three possible alternatives to having term run from the death of the author, e.g. having it run: (1) from the date of creation of the particular work, (2) from the date of first non-secret distribution, or (3) from the date of publication as defined in the UCC or Berne Conventions. The first two of these alternatives would contravene international obligations, except perhaps in the case of "corporate authorship". A possible advantage of basing term on life is that all of an author's work would fall into the public domain at the same time.

1. Copyright subsists in a joint work for the life of the author who dies last and for 50 years thereafter.
2. Ilsley Report, op cit, p 19.
3. Except as discussed above with respect to works of joint authorship, where Article 7 (bis) provides that the term must run from the date of death of the author who dies last. Also, those Berne countries which are members of the UCC must provide a term consistent with the minimum requirements of the UCC.
4. The "country of origin" of a work is that country in which the work is first published.
5. The "possibility" has become reality: a recent case in France established that an American work no longer protected in the USA could not by means of the UCC acquire in France protection of a longer duration than that provided in the USA; Galba Films v M. Friedman et al, 1974, Cour d'appel de Paris; RIDA, Jan. 75, p 106.

As stated earlier the general recommendation of the Iilsley Commission, that term be calculated from the date of first publication, was made on the assumption that Canada would change its law prior to accession to the UCC and adjust term to that of the USA. That assumption proved erroneous. Canada however, may not be completely foreclosed from calculating term of copyright protection from the date of first publication. Article 4 (2) of the UCC reads:

any Contracting State which, on the effective date of this Convention in that State, has limited (this) term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication ...

Under Canadian law the term for posthumously published works, (s 6), and for Crown copyright works (s 11) is computed from the date of the first publication. Each of the sections might be considered to define a "class of work" within Article 4. It is arguable, therefore, that Canada could reduce term to 25 years from the date of first publication. The Convention could be interpreted to require a general term of life plus 25 years with entitlement to make a virtually unlimited number of extensions, and it might not be contrary to the Convention to extend the method in question to all classes of works.

However, as the Iilsley Commission noted, if joint authors must be treated by "life" measurements, sole authors should be treated similarly. Moreover, there remains the difficulty of reconciling the Berne "life" measurements with the UCC possibilities.

It is not considered that the point of departure for calculating the duration of protection should be the date of first publication. If, however, the "life" measurement is to be retained in Canada, some accommodation will have to be devised where the original owner of the copyright is an employer or a corporation. This, however, is more a drafting problem.

In dealing with the actual duration of copyright protection (as opposed to the point of departure of that duration), the consequences of reducing that term of protection must be considered.

The matter can be considered in the light of the question: How would a Canadian author of an unpublished work, resident at all material times in Canada, react when faced with a reduction in term of protection?

Publication in a convention country identifies that country as the country of origin of the work, for the purposes of the conventions. The work is thereby entitled to the term of protection granted in the country of origin and the term granted in each of the convention countries. If the countries are at the Brussels or later levels of the Berne Convention (the vast majority), the term would be life plus 50 years; if they are at the Rome level, the term would be whatever the national legislation provides. In the UCC, the same general consideration applies: the term of protection would be a minimum of life plus 25 years in those UCC countries that do not calculate term from the date of first publication. Of course, many UCC countries are also members of the Berne Convention and, accordingly, Berne Convention protection would apply where

the country or origin of the work was determined to be a Berne Convention country. Recalling that the "rule of the shorter term" permits convention countries to cut back the term given to that of the country of origin, a Canadian author who wishes to have a longer term of protection than that provided in Canada should effect first publication in a foreign country.

Apart from any drastic consequences publishing abroad would have on the domestic publishing industry, Canada, should it reduce its term of protection, would have to be prepared to accept the same term abroad. If, despite the Berne rule of the "shorter term", there is some uncertainty about whether protection of Canadian works in foreign countries might in fact be reduced, let alone significantly, it should be noted that France is prepared to require strict observance of the conventions.

In any event, evidence pertaining to the appropriate general term of protection is inconclusive. There are those who see copyright as a monopoly, and who therefore favour restriction of term; and there are those who uphold an author's property right, and who favour extension of term. The answer lies, it is suggested, in determining what is an adequate period of return for creative labour.

*RECOMMENDATIONS:*

1. *That the general term of protection remain life of the author plus 50 years, for all published original works.*
2. *That relevant variations of the rule be made to clarify cases where the original owner is a corporation. This variation would also apply to situations where, by virtue of an employment relationship, copyright originally vests with the employer.*

**2. Unpublished Works**

(a) General

Unpublished works can be divided into two categories: unpublished works of authors still living; and works which are unpublished at the time of the author's death. There are no problems arising with respect to the former. As one of the exclusive rights of an author is the right to publish, it stands to reason that an unpublished work should be protected at least until publication, and if publication occurs during the author's lifetime, the term of protection is for the balance of the author's life and for 50 years following his death.

With respect to works not published at the time of the author's death, however, it is necessary to consider what the duration of protection should be and the point of departure for measuring that protection.

As a minimum period of protection, the latest Text of the Berne Convention requires a term of life of the author plus 50

years. The Canadian Copyright Act goes beyond this, providing that copyright (in posthumous literary, dramatic and musical works) subsists "until publication, or performance or delivery in public, whichever may first happen, and for a term of 50 years thereafter".<sup>1</sup> This section does not apply to artistic works which, published or not, have a protection period of life of the author plus 50 years. Thus, where a work is unpublished at the time of the author's death, protection could be perpetual, provided the work remains unpublished, or not performed in public (in the case of dramatic and musical works), or not delivered in public (in the case of lectures).

These works could include those of professional authors or composers, in varying stages of completion, and which could be of value to their estates. They could also be works of non-professionals, such as letters, diaries, manuscripts, or any work of archival value. The works of professionals are generally in the hands of people who wish to exploit pecuniary rights and therefore these works will usually be made available. Such is not necessarily the case, however, with letters, diaries, and manuscripts. In any event, there is a strong public interest in gaining access to manuscripts, and making available the information they contain. On the other hand, there is an equally strong need to protect authors and copyright owners from unwarranted derogations of their private rights.

Taking into account the apparent inordinately long term of protection for unpublished material, a balance must be sought between the desire of owners to protect and exploit their material and the desire of researchers and historians to gain access to, and use of, copyright material. At the same time, any new provisions should not operate to discourage the depositing of material in archives.

At the present time, people who make such deposits are probably encouraged by the assurance that their works will remain undislosed until the expiration of a given period. Should the term of protection be drastically reduced, copyright owners might well destroy their works to avoid an untimely publication.

It would seem to be in the public interest to provide a term which ensures both protection for a reasonable period and access to the works thereafter.

With the same concern in mind, the Ilesley Commission said the following:

We think that there would be no serious objection to providing for the complete expiration of copyright in literary, dramatic and musical works as to which there is no publication, etc., whether letters, diaries or other works, provided a sufficient length of time is required to elapse both after the time the works came into existence and after the author's death ... It would be of assistance to biographers and historians to be able to publish letters and other manuscripts without being obliged to seek out and settle with the owners of copyright in an unpublished work of an author long dead. Of course they could not publish them unless the owners of the letters or manuscripts

1. Copyright Act, s 6.

permitted access to them. But these owners might not, be the owners of the copyright. The owners of the copyright would we think be adequately protected if the copyright in such cases expired 75 years after the author's death, or 100 years after the work was written, whichever periods ends later.<sup>1</sup>

Unfortunately, computing term of protection from the date of creation of a work imports the inherent difficulty of first ascertaining the date of creation. It is suggested that easier methods of calculation could yield the same results. In this respect, the first part of the Ilsley recommendation suggesting a period 75 years after death appears to be satisfactory. It would seem more consistent, however, with respect to encouraging the deposit of unpublished works in archives, to recommend that an additional period of 25 years protection be provided for deposited works, rather than the Ilsley alternative of computing term from the date of creation.

While the precise periods of 75 or 100 years of protection seem somewhat arbitrary, these periods are based on the traditional method of counting generations. It is believed that the passage of three or four generations after the author's death should, in the words of the Gregory Committee, "be sufficient to remove any reluctance which owners of manuscripts might feel when depositing family and other archives in places where they are open to public inspection".<sup>2</sup>

#### RECOMMENDATION:

That the term of protection provided to literary, dramatic and musical works unpublished at the author's death be until publication or public performance and for 50 years thereafter, but that the total term of protection not exceed 75 years after the death of the author, or 100 years after his death where the work has been deposited in an archives.

#### (b) Exceptions

##### i - Photographs and Engravings

Photographs and engravings are not protected for the same period of time as are all other artistic works. By virtue of s 6, engravings unpublished at the time of the author's death are protected until publication and for 50 years thereafter. Photographs are protected for 50 years from the making of the original negative from which the photograph is derived.<sup>3</sup> This Paper recommends that photographs be treated as artistic works, thereby enjoying a term of protection of 50 years after the death of the author, whether published or not.

1. Ilsley Report, op cit, pp 41-42.

2. Gregory Report, op cit, p 13.

3. Copyright Act, s 9.

Indeed, there seems to be no strong reason, other than curious historical tradition, to isolate photographs and engravings from other artistic works and to provide them with a special regime of protection. It is submitted that the advantage of having a simple law far outweighs the necessity of having a host of exceptions designed to strengthen the minute differences among the protected subject matter.

*RECOMMENDATION:*

*That photographs and engravings enjoy the same term of protection as all other artistic works: 50 years after the death of the author.*

**ii - Anonymous or Pseudonymous works:**

These works are those whose author wishes to conceal his identity. If term is to attach to a work on the basis of the author's life, there arises the obvious difficulty of ascertaining the time of the unknown author's death.

In some countries, that difficulty is resolved by computing the term of protection from the date of publication of the work. Although the Canadian Act makes no specific provisions with respect to anonymous or pseudonymous works, it would appear that the publisher is deemed the owner and that copyright subsists for his lifetime plus 50 years.<sup>1</sup>

These works are protected under the Berne Convention (Rome Text). Article 7(3) provides that the term is to be that prevailing in the country where protection is sought and, under Article 15(2), the publisher whose name is on the work is entitled to protect the author's rights. Later Texts specify a minimum term of 50 years from publication, but where the particular pseudonym leaves no doubt as to the author's identity, or where the author discloses his identity during the 50 year period, the ordinary term of protection is to subsist.

In the UCC there are no specific provisions regarding anonymous or pseudonymous works, and protection is accorded only by domestic law. However, under both conventions, where the work has been published in a non-convention country, practical difficulties will occur in determining whether the anonymous or pseudonymous author is a national of a convention country.

Under the new USA law,<sup>2</sup> protection for an anonymous or pseudonymous work is to last for 75 years from first publication or 100 years from the year of its creation, whichever expires first. If, prior to the end of such term the identity of one or more of the authors is revealed, the term is to be based on the life of the author(s) whose identity has been revealed.

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1. Copyright Act, s 20(3) (d).

2. Public Law 94-553, effective January 1, 1978.

In the UK, anonymous and pseudonymous works are not defined but the applicable term is 50 years from publication. However, if before the end of the period it is possible for a person without previous knowledge of the facts to ascertain by reasonable inquiry the identity of the author, or, in the case of a joint work, of one or more of the authors, the foregoing will not apply. It is also provided that a work published under two or more names shall not be taken to be pseudonymous unless all the names are pseudonyms; the known author of a pseudonymous work is considered the sole author.<sup>1</sup>

The British solution for the treatment of published anonymous or pseudonymous works is undoubtedly very logical: the most easily ascertainable date, that of publication, becomes the point of departure for computing duration of protection, but the general principle of "life measurement" is reverted to where the identity of an author is revealed.

However, that solution breaks down in the instance of an unpublished anonymous or pseudonymous work. In such a case, term could not be computed from the death of the author (as he is unknown), nor from the date of publication (as the work is unpublished). There is but one alternative point of departure left: the date of creation of the work.

Admittedly, computing term of protection from the date of creation of a work raises many difficulties. However, it appears that, if perpetual protection is to be avoided, the only solution remaining is to follow the example of the US new 1978 law. Published anonymous and pseudonymous works, can, however, be adequately dealt with under the UK solution.

#### *RECOMMENDATIONS:*

1. That published anonymous or pseudonymous works be protected for a period of 50 years from publication; but that where the author's identity is not in doubt or where he discloses his identity during the period, the ordinary term of protection apply.
2. That a publication under two or more names not be considered pseudonymous unless all names are pseudonymous.
3. That the known author of a pseudonymous work be deemed the sole author of that work.
4. That an anonymous or pseudonymous work, unpublished at the time of the author's death, be protected until publication and for 50 years thereafter, provided that the total term of protection not exceed 75 years from the date of creation of the work, or 100 years from the date of creation in the case of a work deposited in an archives.

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1. Copyright Act (UK), Second Schedule (to s 11).

### iii - Joint works

Joint works are presently defined as works "produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors". The term of protection for such works is calculated from the date of death of the author who dies last.<sup>2</sup>

As was noted in the discussion of term of protection for published works, the Rome Text of the Berne Convention stipulates the term of protection of joint works is to be based on "life measurement". The UCC makes no provisions for joint works.

One apparent potential conflict between the Berne Convention and the Canadian Act arises where a joint work is written anonymously or under one or more pseudonyms. The Convention requires "life-measurement" for calculating term for joint works, while under the Canadian Act term is to run from date of publication for those anonymous and pseudonymous works remaining unpublished at the author's death.

However, it is submitted that the Convention had not adverted to the possible existence of an unpublished anonymous or pseudonymous work of joint authorship. Thus, the recommendations made in the preceding section regarding anonymous and pseudonymous works cannot be said to be inconsistent with the Convention. The Canadian Act would merely be more precise, much like the UK Act, in providing for calculation of term from the date of publication in the case of unpublished joint pseudonymous and anonymous works.

It is therefore sufficient to recommend that the principle of the present section 8(1) be maintained, while confirming the recommendations made above with respect to anonymous and pseudonymous works.

### RECOMMENDATION:

*That term of protection for joint works be life plus 50 years calculated from the death of the last surviving author, subject to the recommendations governing anonymous and pseudonymous works.*

### iv - Reversionary Interest<sup>3</sup>

Section 12(4) of the present Act provides for the author a right to assign his copyright. However, s 12(5) limits his right to assign in that he cannot assign any interest beyond the 25 year period following his death.

The underlying principle appears to be that an author's heirs should not suffer the consequences of the author's original bargain, consideration for which may later prove insufficient; section 12(5)

1. Copyright Act, s 2: "work of joint authorship".

2. idem, s 8(1)

3. See also p 76, below.

would enable his heirs to make a more profitable arrangement. However, it may be argued that contracting parties should be free to agree to expiration terms of their own choosing, unrestricted by artificial limitations tending to reduce the consideration. Indeed, copyright negotiations are probably conducted with an effective duration in mind of life plus 25 years.

The repeal of the provision has been recommended on the grounds that (a) if it at all affects the incentive to create, it affects it adversely, and that (b) any privileges it does confer on the estate are equally open to a third party publisher willing to seek a compulsory licence and to pay royalties in accordance with s 7.1 The main objection has been that, while every publisher depends on the average return from all his risks, he equally depends on the ultimate value of his successes over a period of years.

In any event, it appears from its wording that s 12(5) could be defeated by testamentary dispositions. Furthermore, the retention of such a provision would be inconsistent with the adoption of a general term of protection of life plus 50 years.

*RECOMMENDATION:*

*That s 12(5) be repealed.*

**E OWNERSHIP OF COPYRIGHT**

**1. Ownership and its Exceptions**

The Canadian Copyright Act does not deal with the subject of ownership clearly. Before discussing the particulars then, it is necessary to state the principles by which ownership in copyright works is presently ascertained.

- (a) The author of a work is recognized as the first owner of copyright in that work (s 12(1)). The underlying principle is that he who creates a work owns the copyright in that work.<sup>2</sup>
- (b) In the case of a photograph, the owner of the copyright is the owner of the negative at the time the negative was made (s 9).<sup>3</sup> Thus, he who takes the picture may or may not be the owner of the copyright.

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1. See p 74, below.

2. An exception, Crown ownership, is discussed separately, beginning on p 223.

3. Similarly in the case of sound recordings, the person who was the owner of the original "plate" at the time the plate was made is deemed to be the author, (s 10).

- (c) Despite the general principles set out in (a) and (b) above, "where in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, (...), then in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright", (s 12(2)).
- (d) Finally, "where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright; but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical", (s 12(3)).

No changes were advocated in submissions to the Department nor are any contemplated with regard to principle (a), that the author of a work is recognized as the first owner of the copyright in that work.

On the other hand, principle (b), now governing ownership in photographs, i.e. ownership of the negative, is no longer suitable, when technological changes are taken into account. It is recommended elsewhere that the definition of photographs should be enlarged to include those "photographs" obtained by means other than wet chemistry.

Accordingly, it should be provided that ownership of the copyright in a photograph vests in the person who, at the time the photograph is taken, is the owner of the material on which it is taken.

With respect to case (c) above, the Iilsley Commission was of the view that the principle of the section should be maintained but thought that the ordering of the "plate" was an unreal test. Rather, the Commission stated that the relevant consideration was "whether the taking of the photograph was commissioned by the sitter or offered by the photographer".<sup>2</sup> The Commission concluded that the commissioner should be the first owner of the copyright, unless there had been an agreement to the contrary. The Commission did not advert to works other than engravings, photographs and portraits, but there seems to be no reason why the ownership of copyright should vest in the commissioner of only these works. The principle should extend to all literary, dramatic, musical and artistic works that are commissioned.

Certain views expressed to the Department regarding (c) and (d) stressed that ownership should in all cases vest in the creator,

1. See p 48, above.

2. Iilsley Report, op cit, p 47.

and that it should be the responsibility of persons commissioning works or employers to ensure, by contract, that all the rights they need are acquired.

The proposal to eliminate the presumptions has a simplistic logical appeal. However, it is suggested that the absence of a statutory presumption in favour of commissioners and employers would result in a spate of contracts and collective agreements, incorporating clauses to the opposite effect.

Case (d) does present one anomaly, however. Where the work is a contribution to a periodical the author only has a right, in the absence of a contrary agreement, to restrain the publication of the work in other than that or a similar periodical, (s 12(3)). It can be assumed that the intent of the law was to restrain publication other than in the periodical originally envisaged by the author. However, the section appears to broaden the principle to make it possible to publish an article ordered for periodical A in periodical B, providing B is a similar periodical to A. The Act should give the author a right to prevent such use.

Similarly, where a work is commissioned for a purpose communicated to an author before he undertakes the work, but is subsequently used for another purpose, it was suggested that the author should be able to prevent the use of the work for the subsequent purpose. It is reasonable that, in the absence of a contract to the contrary, the creator should have the right to prevent use for a purpose other than that on which he based the acceptance of his commission.

#### *RECOMMENDATIONS:*

1. *Subject to the exceptions that follow, that the author be the first owner of copyright.*
2. *That ownership in a photograph vest in the person owning the material on which the photograph is taken.*
3. *That the ownership of the copyright in any commissioned work be vested in the person commissioning the work, in the absence of an agreement to the contrary.*
4. *That, similarly, the principle that the employer is the first owner of the copyright in works made by his employees in the course of their employment, be retained.*
5. *That, unless otherwise provided by contract, where a contribution to a particular periodical is ordered by a proprietor:*
  - (i) *the proprietor be entitled to the copyright only insofar as it relates to publication in that periodical;*
  - (ii) *the author be entitled to the copyright in all other respects.*
6. *That the principle be recognized that a work commissioned for one purpose cannot be used for another, unless there is an agreement to the contrary.*

## 2. The Exercise of Ownership of Copyright

It is a corollary to the granting of exclusive rights that owners can deal in and with these rights during the term of protection. This section discusses the extent to which owners of copyright should be able to exercise their rights.

### (a) Assignments, voluntary licences, testamentary dispositions

Presently, owners of copyright "may assign the right, either wholly or partially, and either generally or subject to territorial limitations, and either for the whole term of the copyright or for any other part thereof" (s 12(4)). In addition, owners "may grant any interest in the right by licence, but no such assignment or grant is valid unless it is in writing", (s 12(4)). An assignee has all the rights of the owner to the extent of the assignment, (s 12(6)).

Concerns have been expressed that a copyright owner's exercise of "territorial limitations" might impose conditions limiting markets and hindering competition within Canada. Territorial division could lead to price discrimination within the country. A Copyright Act should not be used for such a purpose.

No other concerns in this area have been expressed, and no recommendations for changes are made. Certain additions to the law have been suggested, however, dealing with successors in title, disposition of copyright in futuro, and bequests of unpublished works. These three matters are discussed below.

#### i - Successors in Title

The Ilsley Commission recommended adding a provision from the UK law:<sup>1</sup> that a licence granted by the owner of the copyright should be binding upon every successor in title to his interest in the copyright.<sup>2</sup> The Commission was, not, however, in favour of the part of the UK Act which continued:

except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser.

The Commission made the following comment on that proviso:

This exception seems to be based on English case law which regards a licence where it confers an interest in the copyright on the licensee, as creating an equitable interest (...) We see no convincing reason why this right should not be treated for the purposes of the Act as a legal right or interest and have priority over an assignment made afterwards whether or not the assignee is a bona fide purchaser for value without notice - so that a licence cannot be retroactively invalidated by an act of the licensor.<sup>3</sup>

1. Copyright Act (UK, s 36(4)).

2. Ilsley Report, op cit, pp 114-115.

3. idem, p 115

### ii - Copyright in Futuro

The Ilsley Commission also recommended adopting a provision that where parties have expressly agreed before the creation of a work that someone other than the author should be the first owner, the ownership should so vest.<sup>1</sup> The present Act does not provide for dealing with rights other than those arising with respect to existing works.

### iii - Bequests

Regarding bequests of unpublished works, the Ilsley Commission recommended the enactment of the substance of Section 38 of the United Kingdom Copyright Act:

Where under a bequest (whether specific or general) a person is entitled, beneficially or otherwise, to the manuscript of a literary, dramatic or musical work, or to an artistic work, and the work was not published before the death of the testator, the bequest shall, unless a contrary intention is indicated in the testator's will or a codicil thereto, be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his death.<sup>2</sup>

There appears to be no reason, however, to restrict the provision to manuscripts of only those works. Original negatives and plates of motion picture films and sound recordings can be considered equivalent to manuscripts.

That the transfer of copyright should be flexible is a generally accepted principle; in views expressed to the Department the importance of retaining the principle of divisibility of copyright was stressed. These principles facilitate copyright dealings on the international level.

#### *RECOMMENDATIONS:*

1. That the present provisions regarding the exercise of copyright ownership be retained, with the exception of the provision respecting territorial assignment.
2. That a licence have priority in law over an assignment made subsequently.
3. That provision be made to permit assignment of copyright in works yet to be created.
4. That the devising of the original of any unpublished material, protected by copyright, presumes devising of the copyright therein, unless a contrary intention is evidenced in the will.

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1. Ilsley Report, op cit, p 116.

2. idem, p 117

## (b) Compulsory aspects affecting exercise of ownership

Certain provisions of the Act override the voluntary exercise of exclusive rights, by compelling certain action in specific cases at particular times.

In the present Act these compulsory provisions are:

- (i) compulsory licences
- (ii) reversionary provisions
- (iii) printing clauses

#### i - Compulsory Licences

Compulsory licences constitute a substitution of a system of enforced access and remuneration for the exclusive rights of authors. Sections 7 and 13 of the present Copyright Act read as follows:

7(1) After the expiration of 25 years, or in the case of a work in which copyright subsisted on the 4th day of June 1921, 30 years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, calculated at the rate of ten per cent on the price at which he publishes the work.

(2) For the purposes of this section, the Governor in Council may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time and frequency of the payment of royalties, including, if he thinks fit, regulations requiring payment in advance or otherwise securing the payment of royalties.

13. Where, at any time after the death of the author of a literary, dramatic, or musical work that has been published or performed in public, a complaint is made to the Governor in Council that the owner of the copyright in the work has refused to republish or to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Governor in Council may think fit.

Compulsory provisions are derogations of exclusive rights and as such should be strictly construed. Section 7, for example, would not extend to many sound recordings, since it would be impossible to ascertain the death of the author of a sound recording where the owner of the copyright is a corporation. Similarly, only "published" works are proper subject matter for a compulsory licence. Also under s 7, copies can be made only for sale and no other rights can be the subject of the licence.

Under s 13 the purpose of the provision could possibly be defeated by an owner showing willingness to publish only at a high price, or to perform in a specific place or in only one of the media.

In any event, although the sections have always been in the Act, no licence has ever issued under this authority. If only for their proven uselessness, the sections should be repealed. Moreover, it is inequitable and discriminatory that only certain works under certain conditions be the subject of compulsory licences. However, in view of the Economic Council's position on compulsory licensing, some further comment is warranted.

The Economic Council adopted the general view that a private right to exclude is an unnecessarily costly technique to guarantee financial reward, and opted instead for compulsory licensing whereby public access and private compensation are both ensured.

However, given the strict construction that might be placed upon them, the present sections do not provide access. Moreover, as copyright does not operate to limit the dissemination of ideas, the object of compulsory licensing, under the Council's recommendations, would be to ensure access to a particular form of expression rather than to the information or ideas embodied in the particular work.

Not surprisingly, the complete abolition of compulsory licensing was urged by a great many authors and owners who saw the present sections as anachronistic and unjustifiable. Section 7 was even characterized as a "mild embarrassment" in international encounters of publishers.

Educational organizations on the other hand urged the classification of education as a special area for consideration, and that the compulsory provisions be expanded considerably to cover, at least in cases where material has already been published or exposed indiscriminately to the public and is not otherwise available to educators.

The latter claimed they were facing two major obstacles in using material protected by copyright: delay in securing copyright clearance and difficulty with the mechanics of payment. Educators felt that compulsory permission with payment struck the best balance between private interests and the educators' interest in access to information.

It should be repeated, however, that the present compulsory licence provisions are, in effect, limitations upon the term of protection and exclusive rights of authors although they entail the payment of royalties. It can be seen that the present licences-permitting either the reproduction of a published work 25 years after an author's death, or the publication or public performance of a work, anytime after the author's death, - are serious limitations on the duration of the exclusive rights of authors. Moreover, such provisions are inconsistent with the recommendation to provide a general term of protection of life plus 50 years, and would in the case of s 13, be an obvious contradiction of it. Finally, the possibility of international retaliation by the application of the "rule of the shorter term" cannot be ignored.<sup>1</sup>

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1. See Term of Protection, p 59, above.

*RECOMMENDATION:*

*That sections 7 and 13 be repealed.*

### ii - Reversionary Interest

In Canada, an author's right to assign or licence the copyright in his work is limited: he cannot transfer any interest whatsoever in that work during the period following the expiration of 25 years after his death (s 12(5)).

Section 12(5) further provides that the interest in the copyright in the work beyond the 25 year period shall devolve on his legal representatives as part of his estate, i.e. the "reversionary interest".

Undoubtedly the purpose behind the enactment of s 12(5) was to provide for a situation where a work, following the author's death, had become more valuable over time. An author's heirs would then, through the reversionary interest, have the opportunity to re-negotiate the royalty terms to reflect the increased value of the work.

However, as was said in the discussion of term,<sup>1</sup> such a limitation might adversely affect the author's original bargaining position.

In any event the principle is subject to two exceptions: it does not apply in cases of testamentary disposition; and it does not apply to a publication of a work or part of a work when it is part of a collective work.

The provision is subject to additional exceptions. Firstly, it applies only in cases where the author is the first owner of the copyright; it does not apply to commissioned works or works made in the course of employment. Secondly, it does not apply to posthumous works, as s 12(5) states only the author himself is barred from transferring his interest; thus, rights relating to posthumous works are freely assignable for the full term of protection. Finally, it is questionable whether the section would apply to photographs and sound recordings as, with these works, ownership does not necessarily vest in the author, but in a person "deemed" to be the author (s 9, s 10).

These exceptions remove the intended effect of the section. For that reason, as well as for the reasons given under Term of Protection, s 12(5) should not be retained in a new Copyright Act.

*RECOMMENDATION:*

*That subsection 12(5) be repealed.*

1. See Term of Protection, p 59, where the principle is first considered.

### iii - Printing Clauses

In the present Act, section 14(1) provides that "any person may apply to the Minister for a licence to print and publish in Canada any book wherein copyright subsists if, at any time after publication and within the duration of the copyright, the owner of the copyright fails (a) to print the book or cause it to be printed in Canada, or (b) to supply by means of copies so printed the reasonable demands of the Canadian market for the book". Section 15 extends a similar principle to certain books begun as serials in certain other countries. Section 16 contains supplementary provisions and also provides that sections 14, 15 and 16 do not apply to any work of which the author is a British subject, other than a Canadian citizen, or the subject or citizen of a country that has adhered to the Berlin Text (1908) of the Berne Convention.

The origins of the so-called "printing" sections are to be found in the USA Chase Act, 1891, which made copyright protection (in the USA) for certain works conditional upon the work being manufactured in that country. Canadian printers and publishers sought similar provisions which led to legislative attempts to adopt a Canadian manufacturing requirement either to require authors to have their works printed in Canada, or to subject works to compulsory licensing as a condition of copyright. The results were partially successful, as evidenced by the provisions of sections 14, 15 and 16.

However, Canada, once having adhered to the Berlin Text of the Berne Convention, was prevented from enacting a manufacturing clause applicable to a United States citizen who first (or simultaneously) published his work in a Berne Union country, unless it did so under that Text's Protocol. Part of the Protocol reads as follows:

Where any country outside the Union fails to protect in an adequate manner the works of authors who are subject to the jurisdiction of one of the contracting countries, nothing in the Convention of the 13th November, 1908, shall effect the right of such contracting country to restrict the protection given to the works of authors who are at the date of the first publication thereof subjects or citizens of the said non-Union country, and are not effectively domiciled in one of the countries of the Union.<sup>1</sup>

In 1923, the Canadian Government passed an Order in Council which restricted the grant of copyright, in accordance with the protocol, with respect to the United States.<sup>2</sup> The sections were considered consistent with the Berne Convention's Protocol (at least insofar as United States citizens were concerned) because of the manufacturing clauses in the United States Copyright Act.

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- Additional Protocol in the International Copyright Convention of November 13, 1908, s 1.
  - Order in Council p.c. 1395, July 27, 1923.

However, the US manufacturing clause is now inoperative vis-à-vis authors who are citizens or subjects of a country which is a party to the Universal Copyright Convention, or whose works were first published in such a country, with the exception of works first published in the US or works written by authors who are citizens of, or domiciled in, the US. In short, works by Canadian authors which formerly had to be manufactured and printed in the USA to acquire copyright protection in that country can now be made in Canada, without forfeiting loss of copyright protection in the USA.

In considering Canada's accession to the UCC, the Ilsley Commission said:

...We would no longer be justified in applying printing clauses to United States citizens as it can hardly be said that the United States now fails to protect in an adequate manner the works of Canadian authors first published outside the United States.<sup>1</sup>

Sections 14, 15, 16 are therefore no longer justifiable and should be repealed.

Moreover, it would be increasingly difficult to justify retention of these sections if the exemption for Canada from the "manufacturing clause", now contained in the revised US law effective January 1, 1978, is maintained.

Incidentally, as with sections 7 and 13,<sup>2</sup> sections 14, 15 and 16 have never been used. Their repeal would obviously not disturb those who originally claimed to have an interest in their enactment.

#### *RECOMMENDATIONS:*

*That sections 14, 15 and 16 be repealed.*

#### CINEMATOGRAPHIC WORKS

##### 1. Motion Picture Films

The protection accorded to films in the present Copyright Act is couched in language depicting an industry in its infancy. The law should relate to the needs of today's sophisticated industry.

Section 2 of the Copyright Act states that "cinematograph" includes "any work produced by any process analogous to cinematography". Hence motion picture films are protected thereunder.

Section 2 of the Act also defines "dramatic work" as including, inter alia, "any cinematographic production where the arrangement or acting form or the combination of incidents represented give

1. Ilsley Report, op cit, p 31.

2. See discussion, p 74.

the work an original character". The Act also provides, in section 3(1)(e), that where "such original character is absent the cinematographic production shall be protected as a photograph". The protection accorded to a cinematographic work (motion picture film) is therefore dependent upon whether it is classified as a dramatic work or as a photograph. Thus, whether a film is to be treated as a dramatic work depends upon whether it meets the test of original character, which in turn is determined by the arrangement or acting form or the combination of incidents represented. A film may be otherwise protected to the extent that it is a contrivance "by means of which sounds may be mechanically reproduced in like manner as if such contrivances were musical, literary or dramatic works", (s 4(3)).

Several problems arise from the dual categorization of film. First, the term of protection for films will vary. In "dramatic" films, i.e. those having "original character", copyright subsists for the life of the author plus 50 years thereafter. With respect to films which are "photographs", i.e. those lacking "original character", the term of protection is 50 years from the making of the original negative. A similar period applies to "contrivances": 50 years from the making of the original plate.

Similarly, ownership of film copyright will vary: with respect to "dramatic" films, the author is the first owner (s 12(1)), except where the work is done in the course of the author's employment, (s 12(3)); with respect to "photographs", the owner of the negative at the time it is made is the deemed author (s 9), and, in the case of a commissioned "photograph", the person ordering the photograph (film) is deemed to be the first owner (s 12(2)); with respect to contrivances, the deemed author is whoever owns the "plate" at the time the "plate" is made, (s 10).

Thus, kind and duration protection of cinematographic works, as well as ownership are very difficult to readily ascertain.

The difficulties arise, in part, from the Rome Text (1928) of the Berne Convention which set out the requirements for "original character". The Brussels Text (1948) removed the distinction among types of films; all films were to be protected as "original" works, and they require identical treatment under this Text. Article I of the UCC, requires the protection of cinematographic works as a class and makes no distinction among various types, kinds or genre of films. The UCC, in fact, appears to require uniformity of protection for all films.

While fascinating academic questions concerning the extent to which the Canadian Act is consistent with the provisions and intent of the Rome Text could be discussed at length,<sup>2</sup> the present concern is with ensuring that the protection provided for cinematographic works is consonant with that provided for other material.

1. Article 14(4), Brussels Text.

2. See Perry R.M., Copyright in Motion Pictures and Other Mechanical Contrivances, in 5 CPR, pp 256-289, for an interesting discussion.

The Iilsley Commission was of the view that films should be treated as a specific class and recommended that copyright subsist in every type of film, for a period of 50 years following its first exhibition in public, or publication in Canada. The Commission considered that ownership should vest in the "maker", defined as the person by whom the arrangements necessary for the making of the film were undertaken.

The exclusive rights that would be accorded to the "maker" as envisaged by the Iilsley Commission were: to make a copy of a film; to cause a film to be seen or to be heard in public; to broadcast a film; and to cause the film to be transmitted to subscribers of a diffusion service (not to extend to rediffusion).<sup>1</sup>

The Commission was also of the view that where copyright has subsisted and then expires, a person who does anything which would have infringed the exclusive rights would not thereby infringe any copyright already subsisting in a literary, dramatic, musical or artistic work embodied in that film. In the UK, a similar opinion had been earlier expressed by the Gregory Committee which stated that "the termination of copyright in a film as such should not prejudice any independent copyright held by the creator of any of the constituent items in which copyright would normally subsist for a longer period. At the same time, such independent copyright should not be capable of assertion so as to prevent or control the performance, reproduction or use of the actual film".<sup>2</sup>

It was ultimately recommended by the Gregory Committee that there be no infringement of copyright in the component works as a consequence of reproduction or performance of the film after the expiration of the copyright in the film.<sup>3</sup> Section 13(7) of the UK Copyright Act (1956) thus reads as follows:

(7) Where by virtue of this section copyright has subsisted in a cinematograph film, a person who, after that copyright has expired, causes the film to be seen, or to be seen and heard, in public does not thereby infringe any copyright subsisting by virtue of Part I of this Act in any literary, dramatic, musical or artistic work.

The effects of the inclusion of such a provision in the Canadian Act cannot be predicted with certainty. It might prejudice, for example, the duration and exercise of copyright in a musical work embodied in the film. The public performance of a film in which the copyright has expired would deny the composer any royalty for the public performance of the music embodied therein, a result not possible under the present Canadian Act.

1. Iilsley Report, op cit, p 79. By "diffusion" the Iilsley Commission meant the showing of a film to cable system subscribers without the film having been first broadcast. "Rediffusion" meant the distribution to subscribers of a broadcast.
2. Gregory Report, op cit, p 38.
3. idem, p 120

It is submitted that to adopt the UK provision in the Canadian law might create more difficulties than would be solved. For this reason, no recommendation on this point is made.

Regarding "publication" of a film, it was recommended to the Department that commercial films exploited in the normal way be considered published, even if the maker owns a chain of cinemas to which he restricts their exhibition. It was also recommended that "publication" be explicitly defined to include general rental, lease or loan of copies, as well as sale to the public.

On balance, it is submitted that copyright protection should be provided to cinematographic works with two objectives in mind: (a) to devise a minimum regime explicitly protecting film to the extent that other convention works are protected; (b) to eliminate uncertainty as to the fact, term, and ownership of copyright. Clarification of these aspects, however, need not mean increases in the present levels of protection.

It was earlier reported that the Ilesley Commission felt that exclusive rights necessary to protect films were the rights of reproduction, performance in public, broadcasting and authorizing a diffusion.<sup>1</sup> It is submitted that, in addition, the right to "adapt"<sup>2</sup> should be provided to a film which is not itself an adaptation.

With respect to the duration of protection it is usually difficult, if not impossible, to attach term to an author, as films are normally the product of a corporate organization. Protection should run from the most easily ascertainable event: the making of the film; and it should be so provided whether it possesses original character or not.

The rights should attach to the "maker", i.e. the organization responsible for the making of the film, rather than to a so-called "author".

Finally, as films are made available to the public in any event whether they are leased or licensed for commercial exhibition, or sold, the definition of publication should recognize these facts.

#### RECOMMENDATIONS:

1. That motion picture films be protected as specific works, whether or not they are of "original character".
2. That ownership of copyright in a film rest with the "maker", defined as the person by whom the arrangements necessary to make the film were undertaken.
3. That the term of protection be 50 years from the date of the making of a film.

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1. "Diffusion" is treated under Cablecasting Rights, p 130.

2. See Rights of Authors, above, p 51.

4. That the only rights of makers be:

- a) reproduction, including reproduction of any substantial part;
- b) performance in public;
- c) broadcasting;
- d) adaptation

5. That publication, with respect to films, be defined to provide for all manners in which films are in practice made available: by lease, rental, sale or licence.

2. Videotape<sup>1</sup>

The present Act includes in its definition of "cinematograph" "any work produced by any process analogous to cinematography" (s 2). The creative processes involved in videotape production may be analogous to those of motion picture film production, but the technical processes are not. It would therefore seem difficult to treat videotape as "cinematograph".

The present Canadian Act is designed to be compatible with the Rome Text of the Berne Convention, insofar as protection is provided to works produced by a process analogous to cinematography. Videotape cannot be included in this definition. The Stockholm revision expanded the definition of "film" to include any technical means that results in a work "expressed by a process analogous to cinematography". This change in wording now makes it possible to include videotape, televisual works, and any other means developed in the future which produce the "effect" of motion picture film.

The uncertain status of videotape was underlined in the views of the private sector and it was recommended that videotape be protected on the same basis as film. In view of the increasing use of videotape as a carrier or a replacement for film, it should be so protected.

*RECOMMENDATION:*

*That videotape be treated as motion picture film for the purposes of copyright protection.*

3. Videograms

The term "videogram" is used to designate a variety of delivery systems, which utilize videotape, film and flat surfaces to store and present visuals and sounds, and are capable of displaying their content by being attached to TV sets, or by using equipment specifically designed for the purpose.

1. An electromagnetic tape upon which may be recorded sounds and visuals providing the same optical illusion as motion picture film.
2. Stockholm Text (1967) of the Berne Convention, Article 2(1).

There appears to be no fundamental difference between the making of videograms and what now occurs in motion picture film making. The same legal relationships will exist between the makers of the videograms and the contributors of its components. It would thus seem logical to provide protection to videograms on the same basis as for film and videotape. The provisions for motion picture film should therefore be broadened to include videograms.

**RECOMMENDATION:**

*That videograms be treated as motion picture film for the purposes of copyright protection.*

**II MATERIAL NOT PROTECTED BY INTERNATIONAL COPYRIGHT CONVENTIONS**

Unlike the material protected by the two major copyright conventions, which members of the conventions are obliged to protect, there is other material which the conventions do not require member countries to protect.

This latter material can be divided into two categories: (1) subject matter which, being the product of technological development, can be distinguished from traditional literary, dramatic, musical and artistic works; and (2) the new forms of "rights" associated with this new subject matter. This latter category is discussed below,<sup>1</sup> together with "rights" arising out of new uses of traditional works.

The new subject matter which came into existence because of technological advances, and which was not envisaged by the two international copyright conventions, comprises: sound recordings, broadcasts, computer programs, published editions, and performances by performers, and is discussed in this section under those headings.

Throughout the discussion it should be borne in mind that none of the above material is a "work" created by an "author" in the strict sense. Accordingly, where protection is recommended, it is tailored to the material discussed and may differ substantially from traditional protection. However, where it is recommended that rights be granted it is to be assumed that they include, as with material protected by the copyright conventions, a general right to "authorize" the exercise of any of the rights recommended.

**A SOUND RECORDINGS**

The protection presently accorded sound recordings is found in sections 4 and 10 of the Act:

4. (3) Subject to subsection (4), copyright shall subsist for the term hereinafter mentioned in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical, literary or dramatic works.

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1. See Other Forms of Rights below, p 118.

(4) ... for the purposes of this Act "copyright" means, in respect of any record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced, the sole right to reproduce any such contrivance or any substantial part thereof in any material form.

10. The term for which copyright shall subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced shall be 50 years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of such contrivance, and where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within Her Majesty's Realms and Territories if it has established a place of business therein.

The assimilation of sound recordings with literary, dramatic, and musical works, presents the same difficulties of application which arose with respect to motion picture films.<sup>1</sup> It would therefore seem preferable, in light of those difficulties, that copyright protection be extended to sound recordings as a separate class of subject matter.

Neither of the copyright conventions requires the protection of sound recordings. In 1948, a wish was expressed by the Berne Union that governments of its member countries study means to protect manufacturers against the reproduction of their sound recordings. However, no international agreement was reached until the adoption in 1961 of The International Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organizations, (Rome), commonly called the Rome Convention.<sup>2</sup> This was followed by the adoption in 1971 of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms: the so-called Phonogram Treaty.<sup>3</sup> The existence of such Conventions is evidence of the fact that the two major copyright Conventions do not protect sound recordings.

Since Canada is a member of neither the Rome Convention or the Phonogram Treaty, it is free to decide the means by which it will protect sound recordings. In this respect it may be useful to examine the systems of protection utilized in other jurisdictions where recordings are protected.

#### 1. Other Jurisdictions

Various means of protecting sound recordings are used in other jurisdictions, including copyright, neighbouring rights, and unfair competition laws.

In the UK, copyright subsists in a recording made by a "qualified person" or in a recording first published in the UK or a country

1. See pp 78-79, above.

2. See p 114 and p 228 below.

3. For a discussion of that Treaty, see p 227 below.

o which the Act extends. The "maker" is defined as the person owning he record and can therefore be a corporation, except where the owner s a person commissioning a record. "Publication" means the issue o the public of copies of the recording. The duration of protection s from the time of the making to first publication plus 50 years hereafter. A recording is protected against (a) the making of a copy of the recording or any substantial part thereof, (b) the ausing of it to be heard in public, and (c) the broadcasting of he recording. Unauthorized importation, sale, hire, offering for ale or hire and commercial exhibition for trade purposes constitute nfringement.

n the USA, the present copyright law (1909) does not afford protec-  
tion to recordings, although a separate Federal law provides a  
imited copyright in sound recordings fixed, published, and copy-  
ighted on or after February 15, 1972 and before January 1, 1975.<sup>1</sup>  
he new US copyright law, effective January 1, 1978, protects sound  
recordings from unauthorized reproduction and unauthorized distribu-  
tion of copies to the public. Ownership goes first to authors,  
with employers automatically acquiring rights from employees unless  
therwise agreed to in writing. The term of protection is the life  
of the author plus 50 years or, in works made for hire, for 75 years  
from the year of first publication or for 100 years from creation,  
whichever expires first. "Publication" is the distribution of copies  
to the public by sale or other transfer of ownership, or "by rental,  
lease or lending".

## 2. Canada

The Ilsley Commission in 1957 recommended that recordings be pro-  
ected, but not as original works. The Commission considered  
that copyright should subsist in every recording whose maker was  
a Canadian citizen, or domiciled or resident in Canada, or a body  
incorporated in Canada, and in a recording first published in  
Canada. The Commission felt that the term of protection should  
be 40 years from first publication, the present period of 50 years  
being considered too long. The owner of the copyright was to be  
the maker of the recording except, where the recording was  
commissioned, the first owner was to be the person commissioning  
the recording.

The Ilsley Commission recommended that the only right in a recording  
be to prevent reproduction. The rights of public performance and  
broadcasting were to be abolished on the ground that such rights  
were not being exercised in any event. Even if such rights were  
exercised, the Commission thought it would have to be through an  
association or society; this had caused difficulties in the UK,  
as noted in the Gregory Report.<sup>2</sup>

In 1971, the Canadian Act was amended to abolish the rights of public  
performance and broadcasting.<sup>3</sup> The law as it now exists is neither  
satisfactory to the recording industry nor to those interested in

1. Public Law 92-140, since extended in duration. The extent to which foreign records are protected remains to be determined.
2. Gregory Report, op cit, para 140 et seq.
3. See pp 83-84 for revised Section 4, and pp 87-88 below.

promoting consistency in copyright law. For example, the term of protection for sound recordings should harmonize with the duration of protection to be accorded to other subject matter of a like nature. As suggested earlier,<sup>1</sup> these problems can be resolved by providing that protection be extended to sound recordings as separate subject matter.

However, certain interests also urge that the law be changed to provide record manufacturers with the additional rights of performance in public and broadcasting. This issue will now be discussed.

### 3. The Performing Right in Recordings

The Economic Council of Canada referred specifically to the performing right in recordings in the following words:

at issue here is the associated performing right in such a recording whereby a record-maker would have, like the writer of the words and music, a legal claim to collect a fee from public users of his product above and beyond the original sale price of the recording. We continue to accept the concept of a performing right in the basic material because this is the only way in which a writer of such materials can get payment related to the use of his work in the market. The record-maker, on the other hand, in spite of many "creative" inputs by his staff, is really in the business of selling a physical item such as a disc or a tape, and it is this activity that should reimburse him. To say that he merits an extra fee each time his physical unit is publicly used is rather like saying that a book publisher should be paid an extra amount each time the book is read. Some countries have been persuaded by arguments for such a performing right in a sound recording, but we see no current shortage of recordings that would indicate inadequate incentives for their creation and justify what would be in effect a use fee on a physical good. Because the present Canadian law does allow a potential for such a right in sound recordings, we suggest it be removed.<sup>2</sup>

A "performing right"<sup>3</sup> in a sound recording should be distinguished from the performing right in any work embodied in that sound recording. A sound recording performing right would enable the owner of the copyright in the sound recording to require remuneration when

1. See p 84.
2. Economic Council Report, op cit, p 158. The "performing right" had been removed, prior to the publication of the Report, for other reasons.
3. In Canada, an author's right to perform his work in public is recognized in the Copyright Act, s 3(1). The right to communicate a work by radio-communication was introduced as a separate right, s 3(1)(f), as a result of Canada's 1931 accession to the Rome Text of the Berne Convention. Although the two rights are distinct, they are referred to collectively as the "performing right" for the purposes of this discussion.

the recording is performed in public or when it is broadcast; this would be possible regardless of whether or not the composer of the music embodied in the recording is remunerated, and whether or not the owner of the copyright in the recording receives remuneration from the sale of copies of the recording.

In 1968, Sound Recording Licences (SRL) Ltd.<sup>1</sup> filed, under Section 8(2) of the Copyright Act, a statement of fees which it proposed to collect for the performance of sound recordings in Canada and which it asserted that the then law permitted. This action was foreclosed, by the Government, in its amendment of the Act, effective January 1, 1971.

The explanatory note accompanying the Bill introducing the amendment stated:

The purpose of this amendment is to confine copyright in records, ... to the reproduction of such contrivances. Under the present wording of subsection (3) of Section 4 of the Copyright Act, copyright extends to performance as though the contrivance were a musical, literary or dramatic work in itself.

The Government's position was stated by the Minister as:

The exercising of a performing right in records can lead only to an increase in payments from Canada to foreign corporations ... 90 per cent of the records manufactured in Canada are made from master recordings from outside of Canada. I fail to see why these should attach a performance right fee, particularly when no such fee is granted in the country of the origin of most of them ...<sup>2</sup>

Opponents of the Bill argued that the abolition of the performing right in records would adversely affect Canadian talent and producers by denying them performance revenues, not only in Canada, but also in those countries prepared to grant such rights on a reciprocal basis. However, the recent CRTC Canadian content regulations have done much to assist the Canadian record industry although many would argue they are not sufficient to correct the imbalance.

The action taken by the Government was one which reflected Canadian interests at the time. The question now is: have conditions changed since the Economic Council reported and since the amendment of 1971 was enacted? Should one reconsider the granting of a performing right in recordings, at least to Canadian recordings? In answering this question one must carefully consider the arguments of those who press for increased development in the Canadian recording industry.

- Incorporated September 27, 1967, to carry on in Canada the business of acquiring copyrights of dramatic-musical works or musical works or of performing rights therein in order to deal with or in the issue or grant of licences for performance in Canada of such works in which copyright subsists.
- Justice and Legal Affairs Committee proceedings, December 2, 1971, No 43: pp 15-16.

The government's 1971 position was that the bulk of any fees collected in respect of the performing right would be exported, thus reinforcing Canada's net importer status. If however the right were extended only to Canadian recordings, benefits would stay in Canada and the present imbalance of trade in copyright material would not be aggravated.

While both the Ilsley Commission and the Economic Council recommended the abolition of the performing right in sound recordings they did so for different reasons: the Ilsley Commission, because the right had not been exercised up to that time and because of the possible difficulties of collective administration;<sup>1</sup> the Economic Council, because the right would be analogous to a PLR and because no requirement for additional incentives for the recording industry was apparent.

However, neither the Ilsley Commission, the Economic Council nor the Government, seemed to consider the possibility of granting a performing right in Canadian recordings only.

It is noted that in the UK, the Gregory Committee, after reviewing the difficulties associated with the granting of a performing right concluded, nevertheless, that the right of performance in sound recordings should not be taken away. This decision reflected the view that commercial enterprises should not be at liberty to use sound recordings without payment.

In support of the Gregory Committee's conclusion it could also be said that the introduction of a performing right in recordings would be consistent with the performing right now granted to films. Even author's rights extend beyond mere sales of copies of books, to translation rights, film rights, etc.

Whether or not a performing right should be provided to non-Canadian recordings would, of course, depend upon the benefits that would accrue to Canada. It is submitted that, in principle, the performing right should only be extended in other countries on a strictly reciprocal basis, and only where the benefits to Canada are sufficient to justify entering into a reciprocal agreement.

It is submitted that a "Canadian recording" should be defined as one where the majority of the elements going into its production, including music, performers and the facilities used, are Canadian. The definition, of course, would have to be strictly interpreted. Moreover, a Canadian record producer, (the owner of the right), should be defined accordingly.

While logic would seem to dictate that a performing right should be granted in Canadian sound recordings, there are other difficulties in exercising such a right, in addition to those identified by the Ilsley Commission and the Economic Council.<sup>2</sup>

1. The Ilsley Commission's apprehensions were based on situations which had developed in the United Kingdom with respect to collectives. The difficulties arose mainly from the lack of a regulatory body equivalent to the Canadian Copyright Appeal Board; see the Ilsley Report, op cit, p 78.
2. The particular position did not receive the support of all Economic Council members; p 113 below.

First, assuming that the definition of what constitutes a Canadian recording would stipulate that the majority of the production elements be Canadian, it remains to be determined how many recordings this would entail. The number of eligible recordings would of course affect the industry's decision to exercise the right, particularly if the right were to be exercised collectively, through a new Performing Right Society.

Secondly, it would be an empty gesture to grant a right which would be impossible to exercise as it would be extremely difficult to exercise the right on an individual basis. In views expressed to the Department, little if any advice was given on how the right might be exercised, to what extent, and what mechanisms could be devised which would ensure its equitable exercise and operation.

RECOMMENDATIONS:

1. That sound recordings be protected by copyright as subject matter distinct from literary, dramatic, musical or artistic works.
2. That, subject to recommendations 6 & 7 below, the exclusive rights in a sound recording be the right to reproduce and the right to publish.
3. That such rights accrue to the "maker" of the recording, except that ownership of the copyright in a commissioned recording belongs to the person commissioning, in the absence of any agreement to the contrary.
4. That the "maker" be defined as the person or entity by whom the arrangements necessary to make the recording were undertaken.
5. That copyright subsist for 50 years from the end of the calendar year in which the recording was first made.
6. That, providing it can be satisfactorily demonstrated that mechanisms can be established to exercise the rights, Canadian sound recordings be further protected by an exclusive right to perform in public and an exclusive right to broadcast.
7. That a "Canadian sound recording" be defined as one where the majority of the elements required to produce the recording are Canadian.

Compulsory Licences for the Mechanical Reproduction of Musical Works on Sound Recordings

Section 19 of the Copyright Act provides that, once a sound recording of a musical, literary or dramatic work has been legally made, others may make sound recordings of that work, through the mechanisms of compulsory licensing.

Though the provision creates a compulsory licence, its abolition has not been strongly advocated by copyright owners. Those interests which have recommended the deletion of s 19 have done so strictly on the basis of the broad principle that a copyright owner should have freedom to negotiate voluntarily, and that this right should not be interfered with. Most owners of copyright in music are directly interested in the recording industry and are understandably ambivalent about recommendations which might benefit them as copyright owners, but which would be to their disadvantage as members of the recording industry.

As no case has been made for the abolition of the compulsory licensing provisions, abolition will not be considered. However, major changes in the present system will be recommended, taking into account the true nature of the system in an attempt to correct certain abuses.

#### (a) Origins of the system

The last decade of the 19th century and the first decade of the 20th century saw increased recording of music by the gramophone industry, and led composers to demand the right to control the use of their works.

In the UK, the recording industry had grown to considerable proportions, due in part to the absence of a requirement to negotiate royalties with the authors whose works it used. It was believed that the requirement of such negotiations would be an impediment to the development of the new industry. It was also thought that only the large recording companies would have been able to meet the royalty demands of authors. To solve the problem, the British Act of 1911 provided a recording right to composers, but subjected it to a system of compulsory licences that was thereafter imported into the USA and Canadian law.

France has no such compulsory licensing system. Its Loi du 10 novembre 1917 fully recognizes the exclusive right of the author to authorize mechanical reproductions of his works. According to the British view, the recording industry in France should have been by now controlled by a few major companies, but apparently this has not materialized. Thus, the rationale for the establishment of a compulsory licensing system now bears re-examination.

The French jurist André Françon characterized the English system as at best a solution of compromise which tried to deal with a hypothetical problem of a past era.<sup>1</sup> However, even those who would recommend the retirement of the system in Canada would accept as an alternative the retaining of a compulsory licensing scheme, if it could be designed to insure greater respect of copyright owners' interests. Its built-in rapidity is an undisputed benefit of a compulsory licence. The remainder of this section will therefore deal with how the present compulsory licensing scheme can be transformed into a suitable alternative to complete abolition of the system.

1. Françon, André: La Propriété littéraire et artistique en Grande-Bretagne et aux Etats-Unis; Librairie Arthur Rousseau, Paris, 1955; p 142.

First, it should be recalled that the right to make any record or other mechanical contrivance of a work is an exclusive right of the author of such work, by virtue of s 3(1)(d) of the Copyright Act.<sup>1</sup>

This exclusive right is consistent with Article 13 of the Rome Text of the Berne Union, which Article also reads in 13(2):

Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country insofar as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

It is because of that provision that Canada has adopted the compulsory licensing system of s 19.

Section 19 of the Act reads:

19.(1) It shall not be deemed to be an infringement of copyright in any musical, literary or dramatic work for any person to make within Canada records, perforated rolls, or other contrivances, by means of which sounds may be reproduced and by means of which the work may be mechanically performed, if such person proves

- (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
- (b) that he has given the prescribed notice of his intention to make the contrivances, and that there has been paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, as hereinafter mentioned.

(2) Nothing in subsection (1) authorizes any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question.

(3) For the purposes of subsection (1), a musical, literary or dramatic work shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(4) The making of the necessary manuscript arrangement and instrumentations of the copyrighted work, for the sole purpose of the adaptation of the work to the contrivances in question, shall not be deemed an infringement of copyright.

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1. See p 49, above: Rights of Authors.

(5) The royalty mentioned in subsection (1) shall be two cents for each playing surface of each such record and two cents for each such perforated roll or other contrivance.

(6) Where any such contrivance is made reproducing on the same playing surface two or more different works in which copyright subsists, and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned among the several owners of the copyright equally.

(7) When any such contrivances by means of which a literary, dramatic or musical work may be mechanically performed have been made, then for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(8) For the purposes of this section, the Governor in Council may make regulations prescribing anything that under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties; and any such regulations may, if the Governor in Council thinks fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(9) In the case of musical, literary or dramatic works published before the 1st day of January 1924, the foregoing provisions shall have effect, subject to the following modifications and additions:

- (a) the conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, do not apply;
- (b) no royalties are payable in respect of contrivances lawfully made and sold by the manufacturer before the 1st day of January 1924;
- (c) notwithstanding any assignment made before the 4th day of June 1921 of the copyright in a literary or dramatic or musical work, any rights conferred by this Act in respect of the making, or authorizing the making, of contrivances by means of which the work may be mechanically performed, shall belong to the author or his legal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work of his legal representatives.

(10) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the 1st day of January 1924, copyright shall, as from the said date, subsist therein in like manner and for the like term as if this

Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived; the person who on the 1st day of January 1924, is the owner of such copyright; and nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

(b) Works subject to compulsory licences

It is stressed that compulsory licence will not issue unless all the conditions precedent have been met. Yet, Article 13 of the Rome Text deals only with musical works, while the Canadian Act permits compulsory licences for "any musical, literary or dramatic work". This inconsistency has not been the subject of much discussion, but there is a strong probability that the Act contravenes the Convention. Some attention was given at the 1967 Intellectual Property Convention in Stockholm to bringing lyrics within the ambit of the possible compulsory licences provisions.<sup>1</sup> It was there proposed that Article 13 of the Convention be amended to read: "... musical works including any words intended by their author to be performed with them". It must be inferred that the general understanding was that Article 13 did not permit a compulsory licensing system to encompass literary works.

On the other hand, the system would be impractical were it not to take into account the presence of lyrics in a very large proportion of musical works. To be coherent, the compulsory licensing system should also extend to lyrics. This can be accomplished in two ways:

- a) by specifically extending the compulsory licences to lyrics accompanying music; or
- b) by defining musical works to include words intended by their author to be performed therewith.

There is no strong advantage or disadvantage in adopting one solution over the other, except that redefining musical works would result in a clearer, and more consistent Act.

With respect to what musical works are to be the subject of a compulsory licence, it is unclear in the present Act whether a licence can issue for the mechanical reproduction of an unpublished musical work. However, where a musical work has already been recorded for public consumption by means of a recording issued for retail sale, it would be illogical not to subject that work to a compulsory licence, even though the work may technically remain unpublished. The application of the section should be made clear.

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<sup>1</sup>. Report of Main Committee I of the Intellectual Property Conference of Stockholm, 1967, held in part to revise the Berne Convention.

**RECOMMENDATIONS:**

1. That "musical works" be defined as including words intended by the author(s) to be performed with the music.
2. That the compulsory licensing provision apply to any musical work that has been the subject of a recording issued for retail sale and made by or with the consent of the copyright owner.

**(c) Recordings made for sale**

Due to an ambiguity in the wording of the Act it is uncertain whether sound recordings may be sold once they have been made. Referring to similar provisions in the 1911 UK Act and the US Act, Françon suggests that the relevant sections must be construed as meaning, "to make and sell", if the system is to have any practical effect.<sup>1</sup>

The 1956 UK Act adds, as a condition of the licence, that the manufacturer must intend to sell the record by retail. The adoption of a similar provision in Canada would remove the ambiguity.

**RECOMMENDATION:**

*That the compulsory licensing provision extend only to the making of sound recordings intended for retail sale.*

**(d) Recordings and motion picture sound-tracks**

In the present Act, a compulsory licence applies only to works which have previously been lawfully recorded.<sup>2</sup> One practical problem of interpreting this provision is whether the recording made by virtue of a compulsory licence should be identical to the "previously made recording". The right to authorize the mechanical reproduction of a work had its origin in the music box. Since then, technology has made it possible to reproduce a work mechanically by dozens of different processes amongst which the present Act does not distinguish. For example, a compulsory licence would allow a manufacturer to press a record of a musical work where that musical work has previously been recorded only on a piano roll with the composer's consent. There is no requirement that the envisaged contrivance be of the same type as the one initially made.

In fact, the most important issue is whether the mechanical reproduction right should include the right to synchronize the music in a motion picture sound-track with the visual action of the film. Eliminating the possibility of any confusion between mechanical reproduction and film synchronization is desirable in order to bring up to date an Act that came into being prior to the "new"

1. Françon, André, op cit, p 137.

2. Copyright Act, s 19(1)(a).

technology of sound motion pictures. It is submitted that any new compulsory licensing provision should include a clear formal exception for synchronization of music in motion picture sound-tracks with the visual action of the film.

(e) Recordings made outside Canada

Another interpretation problem hidden in the phrase "such contrivances have previously been made ..." is whether the original contrivances must have been made in Canada or whether a compulsory licence can issue against a work previously recorded in a foreign country. The problem is well presented by Fox as follows:

It is not apparent whether the previous lawful making of contrivances must have taken place in Canada or whether a previous lawful making anywhere in the world is sufficient. ... the Act places no such territorial limitation and it may well be that if the copyright owner consents to the making of contrivances anywhere, that is a sufficient foundation for the operation of s 19 and for the making, in accordance with its terms, of contrivances in Canada.<sup>1</sup>

The Iilsley Commission recommended that where a person who has an exclusive right to authorize the making of records of a work in any country does authorize the making of records in that country, a Canadian manufacturer should have the right to make records of that work in Canada. The Commission stressed, however, that authorization to make records in the foreign country had to have been given.<sup>2</sup> It would not be sufficient to merely establish that the recording was made legally in the absence of authorization.

While such a restriction is well advised, it does not go far enough. It is necessary to compare the copyright protection that will affect musical works, with the one that has been recommended for literary works. The principle of territorial divisibility of copyright should be recognized in terms of mechanical rights. If the copyright owner has not chosen to make his work available on mechanical contrivances in Canada, he should not be forced to do so by a system of compulsory licences.

On the other hand, while preserving the copyright owner's right to control the availability of his work on a territorial basis, the Canadian Act should not render compulsory licences applicable mostly, or even almost exclusively, to Canadian works. This would be the effect if the Act were to state that compulsory licences for mechanical reproduction may issue only where a recording has been previously made in Canada. It is recognized that current industry practice is to import "master tapes" of foreign works and press the recordings in Canada. However, having the issuance of a compulsory licence rest on such an interpretation of the words "made in Canada" is, at best, ambiguous. The UK Act takes care of a similar situation in its section 8(a) by providing that records must have previously been made in, or imported into, the United Kingdom for the purposes of retail sale. This should be the position that Canada adopt.

1. Fox, op cit, p 183.

2. Iilsley Report, op cit, p 67.

**RECOMMENDATIONS:**

1. That it be specified in any new Act that a film sound-track is not a sound recording for the purposes of compulsory licensing for mechanical reproduction.
2. That, as a condition of the issuance of a compulsory licence to mechanically reproduce a musical work, the musical work must have been embodied in a sound recording previously made in, or imported into, Canada for the purposes of retail sale, by or with the consent of the copyright owner of the musical work.<sup>1</sup>

**(f) Notices**

By virtue of s 19(1)(b), a compulsory licence may not issue unless the manufacturer proves that he

(...) has given the prescribed notice of his intention to make the contrivances (...)

Three sorts of notices are considered, under subsections 1(b), 7, and 9, although s 19(7) really creates, under certain circumstances, a presumption that the copyright owner has consented to the making of the previous mechanical reproduction of his work; the Act actually uses the term "inquiries" rather than "notices" for that particular situation. In any event, the above-mentioned subsections of the Act fall short of covering the whole range of notices. One must also refer to Copyright Rules 21 and 23<sup>2</sup> to understand how these notices, or inquiries, operate.

A more efficient compulsory licensing system would require only one form of notice to the copyright owner: the general notice presently provided for under s 19(1)(b) and Rule 21(2). Since the use of that notice is simple, efficient, and well known to the recording industry there would be very little advantage in radically modifying it. There is, however, one anomaly under the present provision: the notice of intention to make a recording must be given to the copyright owner not less than ten days before the delivery of the first contrivances to the "buyer";<sup>3</sup> but, the copyright owner also has a period of ten days to answer that notice.<sup>4</sup> Even where the copyright

1. The words "for the purposes of retail sale" would also have the effect of restricting the interpretation to be given of the "previous recording". Such a previous recording would thus have to be a commercial one, as opposed to an archival copy, a standard copy, an ephemeral recording or, in most instances, a film sound-track.
2. The Copyright Rules: established by Order in Council P.C. 1954-1854 of December 1st, 1954: published in the December 22nd issue of the Canada Gazette of that year. Rules 3 to 30 deal with the compulsory licensing system of Sections 7, 14 and 15; Rules 21 to 26 deal with mechanical recordings; Rules 27 to 36 establish the forms used in registration.
3. Rule 22
4. Rule 23(1)(b)

wner answers the manufacturer before the expiration of that latter period, a strict interpretation of the rules implies that the recordings could not be delivered to the buyer before the end of the original ten day period. By retaining a provision granting the copyright owner a ten day period to answer the notice but stipulating that no recordings are to be delivered to a "buyer" before the notice has been answered or before the expiration of the period, whichever comes first, the Act would achieve what is sets out to do and, in fact, recognize what is probably current practice in the industry.

The Act should also require that the notice be sent to each copyright owner individually, especially if words are part of the musical work, in order that both the owner of the copyright in the lyrics and the owner of the copyright in the music receive the required notice.

In addition, the notice should contain all the information required by the present Rule 21(2), plus a statement warning the copyright owner that he has ten days to answer, and that if he fails to do so, the manufacturer may deposit the royalties with a trust organization. This would not add anything to the present system, but would merely serve to instruct the copyright owner of his rights.

Finally, the notice should state how many sound recordings the manufacturer intends to make. This would ultimately enable the copyright owner to verify the royalty statements of the licensee.

#### **RECOMMENDATIONS:**

1. That the notice required by s 19(1)(b) and Rule 21(2) be retained with the addition of the following information:
  - a) a warning to the copyright owner of his obligation to answer in the following ten days and of the consequences of failing to do so;
  - b) information on how many sound recordings the manufacturer intends to make.
2. That Rule 22 be replaced by a provision to the effect that no recordings are to be delivered to a buyer before the notice has been answered or before the expiration of the period to give such an answer, whichever comes first.

#### **(g) Answering the notice**

According to Rule 23(1)(a), the copyright owner who receives a notice must let the licensee know where he may send his royalty payments. Under the present system, the copyright owner's answer to the notice received from the manufacturer actually consists of two statements: one being the address at which royalties may be paid, the other being a declaration that the owner agrees to be paid on a quarterly basis.

In the USA, royalty payments must be accompanied by a detailed and certified statement of account. In Canada, such a statement is required only where the address of the copyright owner is unknown and where the royalties are deposited in a chartered bank.<sup>1</sup> The

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<sup>1</sup>. Rule 23(1)(c)

US system would appear more fair in its accountability to the copyright owner.

Furthermore, conditions in the industry are such that the rendering of statements only on a quarterly basis may allow enough time for a marginal operation to leave the industry without paying royalties.

*RECOMMENDATIONS:*

1. That, upon being served a notice of intention to make sound recordings, the copyright owner have ten days to answer on a form prescribed by regulation, which form shall provide the manufacturer with an address where he must effect payment of mechanical royalties.
2. That the payment of royalties be made on a monthly basis, and be accompanied by a detailed statement of account, certified by a chartered accountant carrying on business in Canada.
3. That failure on the part of the copyright owner to answer the notice within the ten-day period enable the manufacturer to deposit royalties and statements in trust and in a manner prescribed by regulation.

(h) Presumption

The exchange of notices described in the preceding paragraphs is based on the assumption that the work has been previously recorded, by or with the consent of the copyright owner. It is not always clear, however, that the recordings in existence have been made with the consent of the copyright owner; under s 19(7) of the present Act, that consent may sometimes be presumed.

Section 19(7) could provide the recording industry with an unfair advantage, but copyright owners have not voiced any complaints, and it must be assumed that the section has not created any hardship for them. Indeed, it is not known how often the section is relied upon. Nevertheless the "inquiry" defined in s 19(7) should at least meet the standards of the notice proposed above, informing the copyright owner that he has 14 days to answer and that, on his failure to do so, it shall be presumed that he had given his consent to the previous recording of his work.

For greater clarity, the Act should also state that the inquiry does not constitute a notice of intention to make. It should specify as well that the presumption arising after failure to answer the inquiry is a presumption of consent to make a previous recording, and not a presumption that a previous recording has actually been made. Thus, the inquiry would not avail a manufacturer who is not certain that a previous recording has been made.

*RECOMMENDATIONS:*

1. That the inquiry in s 19(7) be retained.
2. That the inquiry be made in the form presently designated in Rules 24 to 27, with the additional requirement that the copyright owner be informed of the 14-day answer

*period as well as of the presumption of consent which arises if he fails to answer within the time period.*

3. *That the Act specify that such presumption is only a presumption that consent was given to make a previous recording.*
4. *That the Act also specify that an inquiry under this section does not, in itself, constitute a notice of intention to make.*

(i) Sound recordings for which royalties are to be paid

Under s 19(1)(b) of the present Act, a third obligation falls on the manufacturer who wants to benefit from a compulsory licence: he must pay royalties.

Under the present compulsory licensing system, when the copyright owner does receive royalties, he is paid for every contrivance sold. It has become the general practice in the industry to maintain "reserves" to account for recordings that might be "sold" to the distributor but returned by the retailer, eventually finding their way back to the manufacturer. In strict accordance with the Act, mechanical royalties would have already been paid to the copyright owner. Thus, when the record is returned unsold to the manufacturer, the copyright owner should return the royalty he was not entitled to receive. It was purportedly to avoid this cumbersome procedure that the reserve technique was developed. Generally, copyright owners are not paid any royalties for the first few hundred records sold. It is also current practice to retain from 5% to 15% of the amounts due in royalty payments, in case of equivalent percentage of records deemed sold is eventually returned unsold.

Leaving aside the question of whether any company needs to protect itself against a return rate of as high as 15%, recording companies should not be in a position to affect the financial security of others, especially when only one recording company in Canada has maintained the bond required, under Rule 23(2), as a condition precedent to the enjoyment of compulsory licences.

Furthermore, as there is always a possibility that some recordings will be returned unsold, copyright owners often never receive monies accumulated in the reserves. Copyright owners have recommended that no such reserves be allowed. It seems that the most equitable solution would be to make the payment of royalties as compulsory as the licence itself, i.e. to require that royalties be paid irrespective of whether or not the contrivance has been sold.

**RECOMMENDATION:**

*That mechanical royalties be paid for every contrivance made under a compulsory licence.*

## (j) Modifications

Section 19(2) deals with the mechanical reproduction of modifications of the original works previously recorded. Under the present Act, such modifications may not be mechanically reproduced by virtue of a compulsory licence unless they have been previously so reproduced with the copyright owner's consent. The Ilsley Commission recommended that this provision be maintained,<sup>1</sup> and there does not seem to be any reason why it should be abrogated or modified.

*RECOMMENDATION:*

*That the substance of present s 19(2) be maintained in any new Act.*

## (k) Compulsory licences not applicable to sound recordings

Section 19(3) is obscurely worded. Apparently, its purpose is to protect sound recordings from becoming themselves subject to compulsory licensing, but, in effect, because the Act presently treats sound recordings as musical works,<sup>2</sup> the section only says that mechanical contrivances are not to be construed as "musical works" for the purpose of compulsory licensing.

As it is recommended that sound recordings be protected as a class of subject matter separate from musical works,<sup>3</sup> s 19(3) should be amended to state that a compulsory licence cannot issue for the reproduction of a mechanical contrivance.

However, such a provision does not adequately deal with the reality of illegal recordings. US jurisprudence has now firmly established the principle that infringers cannot avail themselves of the compulsory licence provisions of US copyright law.<sup>4</sup> Infringers automatically infringe the copyright in the work embodied in the sound recording whenever they unlawfully copy another sound recording. Such principles should be recognized and codified in any new Canadian Act.

*RECOMMENDATIONS:*

1. *That the principle behind present s 19(3) be retained, but the wording changed to accord with previous recommendations concerning sound recordings.*
2. *That the copyright in a musical work be considered infringed when a sound recording is duplicated without authorization, even where other conditions for the issuance of a compulsory licence have been met.*

1. Ilsley Report, op cit, p 70.

2. Copyright Act, s 4(3).

3. See p 89, above.

4. See: Colorado Magnetics Inc. v Edward B. Marks Music Corp (Supreme Court, no 73-2006, Jan. 20, 1975 - 213 PTCJ A-16) also: Heilman v Levi (District Court for Eastern Wisconsin, April 28, 1975).

(1) Arrangements

Apart from dealing under s 19(2) with direct modification of a work, the Act, under s 19(4), also takes into consideration the necessary manuscript arrangement and instrumentation of the work for the sole purpose of its adaptation to the requirements of the contrivance. Such changes are permitted under the present Act.

The scope of the exemption of s 19(4) is very limited, and one cannot see how such an exemption might be avoided, once the decision has been made to maintain a compulsory licensing system. It would otherwise be useless to provide recording manufacturers with a right that they could not exercise because the means to exercise it would still be subject to the authorization of copyright owners.

At the same time, between the narrow manuscript arrangement provision (s 19(4)) and the broad modification provision (s 19(2)), there is a grey area not considered by the Act: those musical arrangements that may change the nature of the work. These are expressly forbidden in the UK Act,<sup>1</sup> and American jurisprudence also leans in that direction.<sup>2</sup>

The question raises difficult conceptual problems: What is a musical style? What is a "sound"? What about the quality of performers or of instruments? It therefore seems best to leave such matters of fact to the courts.

*RECOMMENDATION:*

*That the substance of Section 19(4) be retained in any new Act.*

(m) Royalties

Section 19(5) of the Act states that the royalty payable under a compulsory licence shall be two cents for each playing surface of each record.

It is obvious that the 1921 legislators could not foresee modern technological developments. In an era in which most musical works are recorded on long-playing albums, tapes and cassettes, s 19(5) is obsolete.

In fact, the recording industry does not always follow the statutory royalty rate. The royalty is sometimes negotiated between the copyright owner and the recording company. A licence will generally be granted based on the payment of a royalty of two cents per work recorded, but where the work is longer than average (four minutes) the royalty might be higher; where two or more works belonging to the same copyright owner are recorded on the same contrivance, the royalty may be lower. The recording company, of course, always has the stronger bargaining position in that it can always threaten the copyright owner with strictly abiding by the law as it now stands.

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1. UK Copyright Act, s 8(6); (also see Copinger, *op cit*, § 789)

2. Edward B. Marks Music Corp. v Foulton et al, 1971 F. 2d 905 (2d Cir. 1949).

The mere fact that the industry feels compelled to be more generous than the present Act strongly suggests that the statutory royalty ought to be revised to the advantage of the copyright owner. It would be absurd to leave it to the recording industry to correct any injustice created by an out-dated Act.

There are also other reasons for increasing the statutory royalty. No one will dispute that the two cents of 1924 has lost its former buying power. Gross inequities would arise if the present law were strictly applied so that, for example, all the different owners of the copyright in works recorded on a long-playing album would have to share four cents (two cents per playing surface) while the album actually sells for \$7.29!

More philosophically, where a compulsory licensing system is retained in spite of doubts about its being at all needed, such a system should disrupt as little as possible the exercise of what would normally be an exclusive right of the author. A recommendation to retain the compulsory licensing system should therefore incorporate a bolstering of the copyright owner's position, by fixing the new statutory royalty at a percentage of the retail selling price of the sound recording.

The Iilsley Commission considered that it would be impractical to base the royalty on the ordinary retail selling price, but offered no reasons for that statement. It also felt that basing the royalty on the manufacturer's price, although not impractical, was undesirable, apparently for quasi-moral reasons: the creator's work has its own intrinsic value and should not be "marketed" according to the value of the production - lavish or "budget" - which is determined by a record manufacturer. Instead, the Commission recommended a fixed royalty of  $\frac{1}{4}$ c per minute of playing time, but not less than 2¢ for any single work, these amounts to be halved when the work is an arrangement of a work in the public domain.<sup>1</sup>

Copyright owners, on the other hand, have recommended a royalty based on a percentage of the retail selling price. Many small independent record producers are also favourable to that position, since they are often composers or publishers in their own right, and represented by copyright owners associations.

The main advantage of a percentage basis for computing royalties is that it provides an automatic adjustment for inflation. But it can also adequately reflect other factors such as changes in the types of mechanical contrivances used. The licensing system would not be so drastically outmoded today had the royalty been calculated on a percentage of the retail selling price, for new techniques would have given rise to equitable royalties. As the Act now stands, there is a disproportion between the amount paid by the purchaser of a sound recording and the amount received by the copyright owner. A percentage system would reinstate some sense of proportion into this market inequity.

The record manufacturer would also discover an important advantage in a percentage system in that he would obtain the necessary price

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1. Iilsley Report, op cit, p 68.

flexibility he needs to market his product at the best possible price, thus ensuring his ability to compete.

Furthermore, the percentage rate recognizes that single record "hits" are the prime vehicle by which songwriters and artists are established. A fixed percentage allows for a greater dollar return, relative to a 2¢ per-song rate on the single record. Single records have generally had a suggested retail price of about \$1.00 and on the basis of, for example, a 5% royalty on retail,<sup>1</sup> the payment to the copyright owner on a single record would be 2½¢ per work. This increase would encourage the investment in single record productions which is what is required to develop a demand for Canadian composers and writers and create "hit" performing artists.

With the exception of the United States, most countries have instituted the percentage system. Specifically, harmonization of the different percentages used is an important element of copyright activity in the European Common Market. It would thus appear that Canadian works might stand a better chance of being used abroad if the mechanical rights were calculated on the same basis internationally.

It has been argued that a percentage system is more difficult from an accounting and administration point of view. However, major performers have always been paid on a percentage basis, and it does not appear that this procedure has created any accounting problems for the industry. Many independent record producers pay their performers on a sliding scale, depending on the number of records sold. The more records sold, the higher the percentage of "royalty".

The Ilsley Commission recommended that a committee be appointed to reassess and revise regularly the rate of royalty;<sup>2</sup> a similar provision was enacted in the UK.<sup>3</sup> Such revision would seem to be an appropriate safeguard.

#### *RECOMMENDATIONS:*

1. *That the royalty rate payable under a compulsory licence be fixed at a percentage of the retail selling price.*
2. *That the royalty rate be regularly reassessed and revised. This task could be the responsibility of the Copyright Tribunal.*<sup>4</sup>

1. Such a percentage was adopted in Australia; see Australian Copyright Act (1968), s 56(1).

2. Ilsley Report, op cit, p 69.

3. UK Copyright Act, s 8(3).

4. See Copyright Tribunal, p 214, below.

## (n) Apportionment of royalties

The question of how royalties should be divided among copyright owners where there is more than one work recorded on the same contrivance is one of pure logic.

*RECOMMENDATION:*

*That, where two or more works are reproduced on the same sound recording, and where the copyright owners are different persons, the royalty should be apportioned among the different owners on the basis of the ratio of the duration of each work to the total duration of the sound recording.<sup>1</sup>*

## (o) Regulations

Section 19(8) authorizes the Governor in Council to make regulations "prescribing anything that under this section is to be prescribed". Under this section, the Governor in Council has adopted a regulation requiring the posting of a bond to secure the payment of royalties. Rule 23(2) states:

Every person proposing to manufacture contrivances under the provisions of section 19 of the Act and this rule shall file with the Commissioner a bond of a recognized guarantee company of Canada, approved by the Commissioner, in the penal sum of five thousand dollars payable to Her Majesty for the benefit of the owners of copyright, to secure the payment of all royalties.

Accordingly, the major record manufacturers posted bonds in 1924. Most of these bonds were never renewed however, and, by the early 1950's, they had all been cancelled. A resurgence in bond-posting took place in 1971 and 1972, but none of these has since been renewed.

Copyright owners frequently complain that mechanical royalties are never paid. Though it is very difficult to come up with positive proof that, as copyright owners suggest, mechanical royalties operate for the benefit of manufacturers, the recent regrouping of copyright owners to better police the payment of mechanical rights indicates there is a problem. Consequently, as a warranty that royalties will be paid, the posting of a bond by the record manufacturer should remain a condition of the right to benefit from compulsory licences. Moreover, the amount of the bond requires upward revision.

1. The Ilsley Commission proposed that the royalty be apportioned between owners "as they may agree or as in default of agreement may be determined by some appropriate tribunal". On the assumption that cases of disagreement would be "extremely rare", the Commission gave the responsibility to the Exchequer Court. (See Ilsley Report, op cit, p 69).

**RECOMMENDATION:**

*That the substance of present s 19(8) be retained in any new Act.*

(p) **Transitional provisions**

Sections 19(9) and (10) deal with transitional provisions. All transitional provisions are the subject of a specific section in Part IV.1

(q) **Non-Compliance with the formalities**

It seem unquestionable that, where a composer is required to grant a licence for the recording of his work, he has every right to expect the manufacturer to abide by whatever rules govern the issuance of the licence in question. It is submitted that the new Canadian Act should provide specific remedies to ensure compliance with the formalities.

**RECOMMENDATIONS:**

1. *That any new Act provide specific remedies to ensure compliance with formalities.*
2. *That, for greater certainty, any new Act specify that, where the conditions of the licence are not met, the licence cannot issue, and in such a case mechanical reproduction of the work is an infringement.*
3. *That, for the purposes of remedies, the formalities of the compulsory licence be considered conditions of that licence.*
4. *That, where the conditions (including the formalities) of the licence are met by the manufacturer, but where he does not pay royalties in accordance with the regulations, the owner of the infringed copyright be permitted to obtain such payment against the manufacturer's bond, whose licence then becomes suspended with respect to further manufacturing and distribution of the infringed work.*
5. *That the regulations specify that all other copyright owners whose works are being mechanically reproduced by the infringing manufacturer may request suspension of operating licences in respect of their own works, if the manufacturer does not maintain the full value of his bond.*

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. See p 231, below.

## B BROADCASTS

A broadcast is not in itself protected by copyright in Canada.<sup>1</sup> Material contained in the broadcast may be protected by copyright, but the protection attaches only to that material and not to the broadcast. Admittedly the broadcast does acquire a certain protection from that afforded to the material being broadcast, but it is merely derivative and of an uncertain nature. Broadcasts are also protected to the extent that the retransmission by simultaneous broadcast is prohibited by section 14 of the Radio Broadcasting Regulations, continued by the Broadcasting Act 1968.<sup>2</sup>

The IIsley Commission recommended that specific rights should exist in a broadcast, lasting for 40 years from the time the broadcast was made, with the following exclusive rights attaching to the broadcaster:

- (a) the right to record the sounds or images of the broadcast or both;
- (b) the right to use such a recording for broadcasting or diffusing;
- (c) the right to use such a recording for causing the broadcast to be seen or heard in public;
- (d) the right to rebroadcast the broadcast.<sup>3</sup>

The Commission rejected a proposal to include a right of rediffusion<sup>4</sup> for a broadcaster or any other copyright owner.

The Economic Council of Canada recommended against "any extension of neighbouring-rights legislation, either domestically or through any treaties that Canada may sign in the future".<sup>5</sup> The one exception was to be broadcasts "where the medium really is the message", so that "the broadcaster can authorize the recording and retransmission of his broadcast except in the case of complete program pick-up for simultaneous transmission by a cable television system".<sup>6</sup>

The recommendation was based on the premise that a broadcaster should have a right to prevent a cable system from recording a program for transmission at another time; and that a broadcaster should have a bargaining position vis-à-vis producers of audiovisual records who are likely to record and offer broadcasts for the new home play-back market.

1. Canadian Admiral Corp. v Rediffusion Inc. et al (1954) Ex. C.R. 362; 14 Fox Pat C. 114; 20 C.P.R. 75.
2. Broadcasting Act, RSC 1970, c.B.-11.
3. Ilsley Report, op cit, p 80.
4. idem, p 80: i.e. The simultaneous rediffusion of a broadcast to subscribers of a cable system.
5. Economic Council Report, op cit, p 160.
6. idem, p 157

In other jurisdictions the protection of broadcasts varies. In the United Kingdom, broadcasts are protected for 50 years from the time the broadcast is made, and the protection encompasses the exclusive right to make a recording of either the visual images or sounds (except for private purposes), the right to re-broadcast, and a performing right with respect to paying audiences. TV broadcasts are subject however to a general right to perform them "in the course of the activities of the school, by a person who is a teacher in, or a pupil in attendance at the school". In France, the Copyright Act covers "radio and television works" explicitly, which are treated in the same way as films. In the United States, broadcasts are nor protected per se.

Canadian broadcasters are not interested in securing ownership of the copyright in material they broadcast; their interest is in contracting for the rights necessary to enable them to broadcast that material. Indeed, broadcasters expressed no interest in having a copyright attach to their broadcasts.

On the other hand, during consultation, non-broadcasting interests favoured protection of broadcasts on the grounds that access to the subject matter of the broadcasts would be facilitated when dealing with broadcasters. These interests further sought exemptions which would permit off-air copying and use of broadcasts.

In accordance with the reasoning and recommendations of both the Economic Council and the Ilesley Report, it is submitted that the provision of a degree of protection for broadcasts would add security to the legal position of broadcasters. Moreover, the separate protection of broadcasts could assist in arriving at solutions with respect to certain aspects of cablevision. Insofar as a term of protection is concerned, it is suggested that the term should conform with the general term provided for material of similar nature: 50 years from the making of the broadcast.

Broadcasts are not material protected by international copyright conventions, and protection can at first be limited to certain Canadian broadcasts and subsequently extended, if considered desirable, to foreign broadcasts on a reciprocal basis.

*RECOMMENDATIONS:*

1. That copyright protection be provided to Canadian broadcasts with the following exclusive rights attaching to the originating broadcasting organization:
  - a) the right to record the sounds and/or images broadcast;
  - b) the right to use such a recording for:
    - (i) broadcasting or diffusing
    - (ii) causing the broadcast to be heard or seen in public
  - c) the right to rebroadcast the broadcast.
2. That the term of protection be 50 years from the time of the making of the broadcast.

## C COMPUTER PROGRAMS

Computer programs or "software" are not directly or explicitly protected in the present Act. The initial question then is whether such programs could fall implicitly within any of the categories of protected subject matter in the present law.

The category of literary works has been cited as a possibility for those who seek to have software come within the ambit of protection. "Literary works" are defined to cover a wide field and include all works that are expressed in print or in writing. The wording of s 2 of the present Act could be sufficiently vague to permit the inclusion of computer programs as "literary works". The relevant part of that section reads as follows: "'every original literary (...) work' includes every original production in the literary (...) domain, whatever may be the mode of form of its expression".

However, the question of legal interpretation aside, the real question is whether copyright protection should extend to computer programs. The Economic Council recommended that Canada should not take "any sort of world lead in extending patent or copyright protection to computer programs at this time. But even if other countries did extend such protection, there might still be good practical reasons for Canada not to follow them".<sup>1</sup>

The Council voiced further words of caution:

We would not consider as increases in basic levels of protection simple lateral extensions of existing incentives purely to take account of the appearance of new media of information-processing, but we recommend that this be done very carefully, with no hidden or partly hidden basic extensions of copyright -- for example, into the protection of ideas as such, supplementary to the traditional protection of idea-expression. Certain copyright problems relating to computers and computerized information systems are likely to be extremely tricky in this regard.<sup>2</sup>

#### 1. The Necessity of Protection

The question of computer software protection must therefore be considered carefully and, in the first instance, whether such protection is even warranted. As was said by the American jurist, Stephen Breyer:

A large difference between the cost of producing a work initially and the cost of copying is not alone sufficient to show that copyright protection is desirable. And the case of computer programs is no exception.<sup>3</sup>

1. Economic Council Report, op cit, p 103.

2. idem, p 144

3. Breyer, Stephen: The Uneasy Case for Copyright: A study of copyright in books, photocopies, and computer programs; in Harvard Law Review, vol 84 # 2, Dec. 1970; p 344.

There is no question that the software industry is growing, evidently without the help of copyright protection. The Economic Council recognized this:

On the basis of current levels of activity, particularly on the production side, this would hardly seem to be a sector of the total information system standing in great need of state-provided incentives in the form of patent or copyright protection.<sup>1</sup>

A good indicator of the software industry's desire for protection is the extent to which the industry takes advantage of the copyright protection presently available. While registration is not compulsory in Canada to obtain copyright protection, it does offer a number of advantages, particularly a presumption that copyright subsists in the work registered. In light of that advantage, one would expect that the industry would avail itself of the registration provision for every computer program it creates.

As a "computer program" category of classification does not exist in the Canadian voluntary registration system, one must turn to the United States for statistics on the extent to which the software industry is seeking protection through copyright registration. U.S. Statistics show that from June 1964<sup>2</sup> to June 1971, 225 programs were registered. From July 1971 to February 1975, 497 programs were registered.

It appears that the American industry initially showed little interest in trying to benefit from the protection offered by copyright. It took 7 years before programs began to be registered in any significant number. This attitude may be the manifestation of the industry's uncertainty whether it in fact wants copyright protection. Actually, the industry is unable to pinpoint exactly what it would want protected. In a 1973 report, the Canadian group of the AIPPI<sup>3</sup> referred to "know-how" rather than computer programs per se:

We do not believe that rights comparable to patent rights or copyrights (sic) should be conferred on all know-how. It might be useful to extend existing systems to provide special patent, copyright or similar rights in relation to computer programs or other works which are included within the definition of know-how (...) We suggest that protection should be provided against the acquisition, use or disclosure of know-how contrary to fair or honest practices.

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1. Economic Council Report, op cit, p 101.
  2. The U.S. Copyright Office began accepting registration of copyright in certain computer programs as of June, 1964.
  3. Association Internationale pour la Protection de la Propriété Industrielle.

It appears that the industry has not yet focussed its attention on any one possible means of protecting computer programs and that computer manufacturers tend to rely on contractual arrangements with users of complete software packages to prevent unauthorized uses and disclosures.

While there is no doubt that an efficient scheme for the protection of computer software would be used if it existed, there is equally no doubt that such a scheme would already have been developed if it had been sorely needed. However, the growing interest in software protection indicates a growing need for such protection, and the urgency of the need might become more apparent in the near future. It is therefore of some value to examine the extent to which computer program protection can be achieved by means of copyright.

## 2. Changing the Copyright Law

There is the possibility of protecting computer software as a separate category of material not protected by copyright conventions. A major advantage would be that protection could be tailored to meet the specific needs of the Canadian industry.

It could be argued, however, that creating a new category of protected material under the Copyright Act might be less satisfactory than designing legislation to deal specifically with computer software. While computer programs could be protected by copyright, it is doubtful that such a scheme would be entirely satisfactory, without copyright principles being twisted beyond recognition. The question was raised in 1975 at the Advisory Group of non-governmental experts meeting in Geneva:

Some experts had doubts concerning the applicability of copyright principles to certain form of computer software, in particular the program code, and as to the adequacy of copyright law in the case of mere use without actual copying in a strict sense. Moreover, reference was made to the traditional concepts of copyright law which might be inapplicable to some elements of computer software, such as originality, moral rights and the term of protection.<sup>1</sup>

While the international community has taken for granted the necessity of protecting software, an American survey<sup>2</sup> reveals that few countries have made provisions in their law for protection, and those that have, have not done so by means of copyright.

This hesitancy at the international level was noted at the Advisory Group of non-governmental experts meeting:

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1. WIPO: Report of the Advisory Group of Non-governmental Experts on the Protection of Computer Programs; Geneva, June 1975; AGCP/NGO/11/11; p 4.
  2. Koller, Herbert R.: Proprietary Rights in Computer Software Inventions; Preliminary results of two surveys; in IDEA, vol 14, 1970-71, p 3.

In spite of the possible incompatibility with traditional copyright concepts ... the participants of the 1974 Advisory Group were generally of the opinion that computer programs in some forms were, or might be, eligible for copyright protection; but the position was uncertain. Moreover, such protection may be of a very limited value since it is generally believed to cover only the copying and not the use of the protected program ...

The advisory group finally concluded that:

as regards legal protection of computer programs, a special type of protection should be established, without prejudice to the continuation of any existing forms of protection; in particular copyright, patent or unfair competition laws.<sup>1</sup>

### 3. Conclusion

It is submitted that the conclusion of the Advisory Group is most rational. However, a certain contradiction is apparent in the conclusion, in that it is recommended that a special type of protection for computer programs be established but that the present available copyright protection be maintained. The dilemma may be resolved by treating programs according to the use to which they are put. Clearly, where a computer program is being used to operate a computer, protection under the present Copyright Act involves all the difficulties mentioned: fixation, actual reproduction or performance, publication, fair dealing, authorship and ownership, and of course the basic question of whether it is properly within a defined copyright category. Where granted, copyright protection may be of too long a duration and may effectively impede development of computer technology. Thus, with respect to use of computer programs as part of computer operations, special means of protection might be established outside of copyright; but whether it is needed should first be determined.

On the other hand, a computer program under other circumstances may easily fall under traditional copyright protection. For example, where a computer program is part of a book, the book, including the program, could not be reproduced without authorization. As the Act now stands, such protection is only incidental. It is submitted that the new Act should, in explicit terms, ensure that works which are normally protected are not deprived of protection because they happen to contain computer programs.

#### RECOMMENDATIONS:

1. That computer programs per se not be protected by copyright.
2. That, where they fall under existing categories of protected material, computer programs embodied in that material be accorded the protection attached to those categories.
3. That it be specified in the infringement action of the Act that nothing in the Act prevents the use of a computer program to operate a computer.

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• WIPO, op cit, p 5.

#### D PUBLISHED EDITIONS OF CERTAIN WORKS

The Economic Council was of the view that where a publisher has gone to the expense of resetting 'public domain' material in a new type set, he should be given protection in that particular edition for a period of ten years. The Council stressed however the need to avoid any "reconstitution of an expired copyright in the basic original work simply because a new edition comes out".<sup>1</sup> The Ilsley Commission while recognizing the work and costs involved in such an enterprise, was "adverse to creating a new copyright unless the need is conclusively demonstrated".<sup>2</sup>

Publishing interests have taken a more embracing view and urge the provision of a copyright in all new editions per se whether in the public domain or not. Their argument is based upon the premise that advances in reproduction techniques have made it possible to reproduce works at lower unit costs than those involved in printing the original edition.

Under the present Act, if the work embodied in the edition is itself protected by copyright, copying requires the consent of the author. Therefore, the edition itself benefits from that protection. But, if the work embodied in the edition is in the public domain, there is nothing to prevent a competitor from copying the work photographically and, in so doing, benefitting from the labours of the first or the original publisher. It is that edition which requires protection.

There is a certain analogy between what a publisher does and what is done by the maker of a sound recording. Both spend time and labour in making material available to the public. It would seem logically consistent, then, that typographical arrangements of public domain material be protected. It is submitted that the term of protection should be the ten year period recommended by the Economic Council. Because published editions are not works protected by the copyright conventions, Canada is free to tailor any protection to its own interests. As was recommended with other material not protected by the conventions, the protection of published editions should be extended to foreigners on the basis of strict reciprocity. Moreover, as this right would be novel in Canada, it is submitted that editions claiming this protection should be marked accordingly, both as a warning and to avoid false claims.

#### RECOMMENDATIONS:

1. *That new editions of public domain material published by a resetting of the material be protected by copyright.*
2. *That the protection extend only to providing a right against reproduction and that the general section dealing with this matter contain the following safeguards:*

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1. Economic Council Report, op cit, p 158.

2. Ilsley Report, op cit, p 27.

- a) No new copyright is to be provided, other than in the edition.
- b) The edition must be a new resetting of a literary, dramatic, musical or artistic work.
- c) The publisher must be a qualified person at the time of first publication, i.e. a Canadian publisher or a publisher of a country to which the particular provision extends through reciprocal agreement.
- d) The term is to be ten years.
- e) The editions must be marked as claiming typographical copyright, and must show the year of publication, failing which copyright is lost.

#### E PERFORMANCES BY PERFORMERS

Performers in Canada receive remuneration for their performances only by contract. Canadian copyright law does not provide a performing right for performers as it does for composers and authors. Unlike the composer of a piece of music, the performer of the piece is not entitled by copyright law to remuneration for re-use of his performance.

The issue is whether performers should, in addition to their contractual rights, have a performing right in their performances. The Ilesley Commission did not consider the matter. However, the Economic Council recommended against providing a performer's right to control subsequent use of a performance, stating that the "main effect might simply be to introduce into the system an extra element of legal complication and delay." The Council went on to say that a "proliferation or a 'layering' of secondary performing rights would be of dubious social benefit and that a performer's control of re-use of his performance should by and large be settled by private contractual arrangements between himself and the holder or assignee of the primary rights". It finally went so far as to recommend against any extension of neighbouring-rights legislation, either domestically or through any treaties that Canada might sign in the future.<sup>1</sup>

The recommendations certainly did not have the full support of all members of the Council. One member stated that there should be a performing right for the performer, so that

... if his performance is recorded in one medium and subsequently used, purchased, or sold, to a neighbouring medium, then payment should be due to the performer as well as to the prime producer for the use of the performance ... This would provide a basis for effective collective bargaining with prime producers regarding residual payments to performers when the recording is used in any neighbouring media.<sup>2</sup>

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1. Economic Council Report, op cit, pp 159-160, emphasis added.

2. idem, p x.

It must also be noted that the Economic Council, in recommending against granting such a right did not consider the possibility of granting it only to Canadian performers. As a solution to the problem and to encourage performers, the Council recommended a greater use of selective grants and subsidies, such as those provided by the Canada Council.

### 1. International Protection

The protection of performances by performers was first discussed at the international level in 1928 at Rome, at a conference held to revise the Berne Convention; no provisions were adopted. At the 1948 Berne revision conference, in Brussels, a proposal to introduce a provision stipulating the general principle that performing artists should receive protection was rejected. Nevertheless, it was considered that the problems affecting performers, record manufacturers and broadcasting organizations should be studied, with a view to adopting protective regulations. It was noted however that the rights sought were not analogous to copyright and that the existing international agreements were not applicable. It was recognized that there was a need for an acceptable international instrument devoted solely to these particular problems, outside the existing conventions.

In 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in Rome. Commonly called the "Rome" or the "Neighbouring Rights" Convention, it has now a membership of 19 states;<sup>1</sup> Canada has not joined the Convention.

Generally, the Convention defined and recognized the rights of those protected: those who perform, who make records or who broadcast. The right of performers were seen as being subsidiary to, or "neighbouring" on, copyright. In fact, the Convention expressly provided, in Article I, that its provisions did not affect copyright.

The Convention was one of national treatment. It provided definitions, established conditions precedent to obtain protection, and provided certain options to national legislations.

Since Canada is not a member of the Convention, and since the copyright conventions do not deal with performances by performers, Canada is free to decide whether and how such performances should be protected.<sup>2</sup>

### 2. Other Jurisdictions

Only a few countries provide protection to performers, and the methods of doing so vary considerably. Those countries inheriting their legal system from the English common law have adopted a criminal sanction approach. The UK, for instance, implemented

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1. Austria, Brazil, Chile, Columbia, Congo, Costa Rica, Czechoslovakia, Denmark, Ecuador, Fiji, Germany (W), Guatemala, Italy, Luxemburg, Mexico, Niger, Paraguay, Sweden, United Kingdom.
  2. Canada is in a similar situation with respect to sound recordings; see p 84, above.

the Rome Convention by making unauthorized recording and use of performances an offence,<sup>1</sup> but made no provision for the collection of fees. However, there is no arrangement whereby money paid by broadcasters in addition to the usual performing right royalties is to be distributed: 75% to record manufacturers and 25% to all performers who participated in the recording.

In the USA, some thought was given to the granting of royalties to performers for the "public performance" of a sound recording, e.g. the playing of a record on a radio station or jukebox. However, a provision granting such royalties is not included in the new law, leaving the situation with respect to performers unchanged.

The Australian government has indicated its intention to ratify the Rome Convention and has circulated draft legislation<sup>2</sup> which would provide certain protection for performers. Consistent with the provisions of the Rome Convention, the draft legislation envisages a term of protection of 20 years.

### 3. Canadian Situation

While appreciating that collective agreements between performers' unions and users bring about payment for re-use of performances, performers nevertheless complain, and with some justification, of their inadequacy in dealing with third parties who, for example, have recorded and used a performance without authorization. Performers point out that the provision of a right similar to that granted to authors would enable individuals or associations to proceed against third parties. They would also seek a criminal sanction against unauthorized use of their performances for its deterrent effect on would-be "infringers".

Those opposed to performers' rights consider that if any recognition is to be given to individual performers, such protection should be in the nature of that now accorded record manufacturers, i.e. a reproduction right only. It was argued that performers who participate in live television, radio or concerts have a full opportunity at the outset of negotiating a fair compensation for their services. Similarly, when a performer enters into a recording contract, the compensation for his contribution can be settled in advance. If appropriate, the recording contract can incorporate conditions for payment in proportion to the number of records sold. However, this arrangement usually applies only to solo performers.

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1. Performers' Protection Act, (UK), 1963, c 53.

2. "Performers" Copyright Act 1974 ("relating to copyright in performances of literary, dramatic and musical works"). Under the Australian copyright law, record manufacturers already have a performing right in their recordings. It is understood that the recording industry has arrived at an agreement with performers' unions concerning a trust arrangement whereby the recording industry will make available to performers part of its revenue from the exercise of the performing right in sound recordings.

Performers seek certain property rights, either through copyright law or the enactment of separate specific legislation. The right sought is the right to prevent unauthorized use of the recorded performance; but realistically, Canadian performers want the right to collect fees from radio stations, television stations, and other users, for their recorded performances when the recording is used, heard, or viewed by the public. While the general aim is to obtain a performing right in all "recordings", the main thrust appears to be directed towards sound recordings and their use by broadcasting organizations, as "recordings" on film or videotape are now usually covered by specific agreements in relation to each use.

In short, performers are seeking, in addition to the rights acquired through their collective and individual contracts,<sup>1</sup> a means of proceeding against third parties for the unauthorized recording and use of their performances and a right to exact a fee for repeated use of their recorded performances.

It is possible to envisage a provision in the Criminal Code making it an offence to record and use a performance without authorization.<sup>2</sup> While this would provide the criminal sanction earlier referred to, it is submitted that the recommendation made hereafter will render such a provision unnecessary.

The question is thus reduced to whether performers should be able to collect royalties for the repeated use of their recorded performances from broadcasters and other users of the recordings. In discussions with the Department it was this question that performers perceived as the central issue.

It has already been recommended that a performing right in sound recordings be given to Canadian interests, for the benefit of Canadians,<sup>3</sup> subject to certain concerns referred to in that recommendation. It follows that performers should also share in the benefits either by means of a separate right or by a share in the proceeds from the performing right in recordings. There is no reason to doubt that this would create a climate conducive to growth in the performing arts, and such a result would be consistent with the present trend towards strengthening Canadian culture. Radio and television make repeated use of performances by performers. Such uses of performances presently entail payment to composers, and there seems to be no reason why they should not also entail payment to the performers.

However, the provision of such a right in the Copyright Act raises problems. Admittedly, performers presently settle, by contract, remuneration for their services. It would not seem advisable therefore to provide a right which might detrimentally affect the collective agreements or individual contracts now in force. Similarly, creators and owners of the music performed are concerned that their existing royalties might be reduced should any

1. Which provide for initial fees, and payments for repeated use of filmed performances, but not of sound recordings.
2. As was done in the UK: see p 115, above.
3. See p 89, above.

tariff be introduced for the benefit of performers. Users also, would be concerned if they had to pay royalties to performers as well as to composers for the public performance and broadcasting of the same music.

No doubt the individual right of performers, if granted, would be assigned to a collective mechanism which would licence use (broadcasting and public performance), establish tariffs and collect the appropriate fees. The payment of royalties to performers might well affect the amounts paid to collectives operating for sound recording manufacturers and on behalf of composers of music. In practice, it may also be necessary in certain situations to obtain multiple licences for the use of the performance of a particular musical work recorded on a particular sound recording. It would follow that failure to obtain a licence from each copyright owner would prevent any performance. These practical difficulties will require particular attention in any study of the reaction by the public to the recommendations made.

The granting of a right in performances should be carefully controlled. Canada is a net importer of performances, just as it is a net importer of copyright material. Hence, the granting of a right in performances, if not tailored to Canadian needs, would result in a further imbalance of royalty payments in international trade. Consequently, as was suggested with respect to the granting of a performing right in sound recordings, the right should be limited to performances by Canadians. As performances are not material protected by the copyright conventions, Canada is free to impose such a limitation.

It would then remain to be determined whether the granting of a right only to Canadian performers would be of significant importance to warrant formation of a collective to exercise the right. However, in spite of these considerations, logic dictates that a recommendation should be made to grant a right in performances by Canadians. Following the model of the Rome Convention, the appropriate term of protection would appear to be 20 years from the date of the first fixation of the performance.

Nevertheless, it would not be in the public interest to grant a right which would not be exercised. Lack of information makes it difficult to see, at this time, how the right would be exercised, if it were granted. Whether collective mechanisms are a viable means remains to be determined. The recommendations that follow are predicated on these concerns.

#### *RECOMMENDATIONS:*

1. That, subject to resolving the difficulties of viable collective mechanisms, revenue sharing, and multiple licensing, a right in performances by Canadian performers be provided in any new Copyright Act.
2. That the exclusive rights granted to a performer be:
  - a) to make a recording of a performance;
  - b) to reproduce recordings of a performance;
  - c) to broadcast and perform in public a performance.
3. That the term of protection be 20 years calculated from the date of the first fixation of the performance.

### III OTHER FORMS OF "RIGHTS"

In this section, a number of matters are considered which are not envisaged by the present Copyright Act: public lending right, droit de suite, domaine public payant, the use of material in information storage and retrieval systems, and cablecasting. These are not "material" for which protection is required, but rather they are new forms of "rights" which might be associated with either convention material or with new (unprotected) subject matter arising out of technological development.

The international conventions to which Canada has acceded do not require any of the above rights to be provided. However, it is clear that, where a new "right" is to be provided in the Canadian Copyright Act with respect to material protected by those conventions, such a "right" would have to be extended to all non-nationals. Of course, this would not be the case with respect to "rights" associated with material not protected by the conventions. Accordingly, this important distinction will be made in the discussion of each of the "rights" indicated above.

#### A PUBLIC LENDING RIGHT

The issue of Public Lending Right<sup>1</sup> can be expressed in the form of a question: should those who enjoy and benefit from borrowed books pay a royalty to the author, for such use? As can be seen from the following quote, the question can also be generalized: should authors be recompensed for lost sales?

Most of the minority in Britain who still read books in hard covers after their formal education is completed do not buy them: they borrow them free of charge from libraries. Most of the people who write books earn less than half the national average wage from their authorship.<sup>2</sup>

This statement may or may not be applicable to Canadian readers and authors but it illustrates how authors view the problem. Their concern is with the loss of sales and royalties, rather than with legal or philosophical problems.

The Economic Council adopted the general preposition that "in order for its economy to grow and develop satisfactorily, a society must be innovative; to be innovative, it must be well informed; and to be well informed, it must be good at the production, distribution and use of knowledge".<sup>3</sup> It was the Council's opinion that "compensation should be in proportion to use and each user should pay his fair share"<sup>4</sup> and that any remuneration system "must make room for the effective operation of such institutions as libraries, which like the copyright system are a vital part of the broad, publicly

1. Sometimes referred to as PLR.

2. Findlater, R.: Preface to Public Lending Right - A Matter of Justice; 1971 Penguin Books Ltd. p 11.

3. Economic Council Report, op cit, p 9.

4. idem, p 141

sanctioned information policy of society, and that the system should be ... practically enforceable ...".<sup>1</sup> Its justification for this view was that making knowledge accessible without a specific use-charge per book or other item was a benefit to society. In keeping with this underlying social purpose the Council was not in favour of a public lending right. In fact, the Council recommended removal of the right to collect a fee for each use of a sound recording on the grounds that it "is rather like saying that a book publisher should be paid an extra amount each time the book is read".<sup>2</sup> The Council could not "justify what would be in effect a use fee on a physical good".<sup>3</sup>

On the other hand the Council called attention to the seeming paradox of giving an author "a copyright that normally provides him with a potential for a financial return on every copy of his book that is sold, then set(ting) up public libraries to that some of these copies can serve many users, in a way that may deny to the author sales that he might otherwise have had".<sup>4</sup>

While neither the Berne Convention or the UCC require the provision of a PLR, Canada is obliged to give foreign authors the same treatment it gives its own nationals under the Copyright Act in respect of any additional right attaching to convention works. If however, a PLR were provided apart from the Copyright Act, then there would be no such obligation.

Authors and publishers were both generally in favour of the provision of a PLR to compensate authors for the use of books and for lost sales. Other groups urged the extension of such a right to other materials that are regularly loaned or rented by libraries: e.g. films, videotapes and sound recordings. Attention was called to the laws and practices of a number of countries that, in their view, provided a PLR or similar right.

#### 1. Other Jurisdictions

The majority of countries, with the exception of West Germany, providing "rights" analogous to a PLR do so apart from Copyright Law. To illustrate how these "rights" vary a number of examples follow.

In West Germany, compensation is to be paid for the leasing or lending of copies of a work, if such is a source of income for the leasing or lending person, or if the copies are leased or lent through an institution open to the public (library, record collection, or a collection of other copies). The claim for compensation can be made by a collecting society only.

In Iceland, the "Treasury of Authors in Iceland", was created by administrative law in 1968. It is reported that "a sum based on a certain percentage of the state contribution to public libraries

1. Economic Council Report, op cit, p 141.

2. idem, p 158

3. ibidem

4. ibidem, p 4

is paid to a central fund, for which (native) writers can apply for scholarships and other support".<sup>1</sup>

In Denmark, royalties are paid to Danish authors or their widows from state funds controlled by the Union of Writers. Calculation of royalties is based on the number of books in the public library system. The right to royalties may not be sold, transferred or pledged in any way; similarly they may not be attached nor included as assets in bankruptcy proceedings.

A Norwegian law of 1947 created a fund for the benefit of Norwegian authors or their widows. The fund is maintained partly by subsidies paid by the State to the fund, and partly by a royalty on the purchase of books for reading rooms.

In Sweden, the Decree of June 17, 1955,<sup>2</sup> calls for the payment to Swedish writers and translators by certain libraries<sup>3</sup> for the lending of their copyright works. There is also a fund for Swedish writers out of which qualified persons individually receive royalties based on the number of loans made of their works. Any remainder is paid into a fund reserved for pensions and subsidies, scholarships for writers, translators and illustrators of merit, and contributions to special literary projects, especially to groups of authors. Authors and their survivors are eligible, but payment is discretionary. The right passes on death by laws of succession and marriage but expires at the end of the usual term, and is not assignable or subject to attachment. A sampling method is used to determine payments.

In Finland, it is reported that "according to laws concerning support to writers ... 5% of the state contribution to public libraries is used for scholarships and other support to authors".<sup>4</sup>

These systems in Scandinavia are of a national character, in that they are available only to nationals of the particular country. A system of reciprocity is considered unfeasible at this time.

The New Zealand Authors' Fund was established in 1973. In order to benefit, an author must be a citizen and resident of New Zealand (not a corporate owner); the benefits do not form part of the author's estate nor are they assignable. They apply generally to published works in which copyright subsists. The scheme is government funded and administered, and operates on a sampling of library holdings, with payments based on the number of copies held.

Australia is the country which most recently introduced a PLR effective since April 1, 1974. The "right" is not based on legislation, but is an administrative scheme with provides for ex gratia payments. The system applies to books which are held in libraries that lend to the public.

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1. Where Libraries Pay Authors, in Variety, January 1974.

2. Amended June 2, 1961.

3. Popular libraries subsidized by the State, and educational libraries.

4. Variety, January 1974.

The scheme does not apply to foreign authors, as it has been specifically established outside the copyright law. It applies to books in general, but not to books published before 1925 unless the author is living; nor to books without identifiable authors, or with corporate authorship; nor to Crown publications, compilations or magazines. The right expires with the death of the author, or on the expiration of a period of 50 years after a book's first publication, whichever occurs later. Authors who have sold or assigned their copyright may still receive the benefits, as entitlement attaches to authorship not ownership. The scheme extends to eligible heirs as well.

In the United Kingdom, the Government referred the question of PLR to a Working Party which reported in 1972.<sup>1</sup> The Working Party did not deal with the question of whether or not a PLR should be introduced, but rather how an amendment to the Copyright Act (1956) could incorporate a PLR into the Act.

The Report pointed out that the UK Act deals with two broad categories of protected works (1) original literary, dramatic, musical and artistic works, and (2) sound recordings, films and broadcasts; and that the first category receives more extensive protection.

It was proposed that the right of "lending to the public" be added to the first category. The right would thus subsist in original works but would not extend to recordings or films though it would, of course, extend to any original literary, dramatic, musical and artistic work embodied in the recordings or films.

The recommendations were seen as being in accord with the feeling that PLR should exist for the benefit of the prime creators. "Lending to the public" was defined as meaning "the making available for use of copyrighted works contained in a library regardless of whether use will take place on or off library premises".

The Report sets out categories of libraries and discusses their inclusion or exclusion in each category. It envisages a PLR applying to all public, commercial and subscription libraries. The national libraries, the libraries of government institutions, and the libraries of business, industrial undertakings, professional associations and similar institutions would, in general, be in the same position. Privately owned libraries, which are accessible to the public would be exempt unless lending takes place for gain.

It was emphasized that PLR would also be extended to foreign authors. This is a different approach from that taken by the countries previously mentioned. By providing a PLR by the Copyright Act, the U.K. would be bound by the conventions to give national treatment to foreign authors. A Public Lending Right Bill, introduced by the government in the fall of 1976, envisaged the establishment of a PLR in respect of books lent to the public by local libraries in the U.K. The Bill did not receive approval.

## 2. Pros and cons

The basic rationale for a PLR is that authors (and publishers) derive income from book sales, and that lending by libraries, permitting

1. Public Lending Right - Report of the Working Party, London, April 1972, H.M.S.O.

multiple access to a single copy, reduces sales opportunities. Free lending therefore reduces income.

According to another proponent of PLR, many authors use library books as a means of collecting information in order to write their own books from which they derive income. A PLR would make these writers pay for their sources. He states:

Every reading of a book by a borrower demands the participation of the author's original creative or organizing power (...) in the same way that a play or piece of music (...) involve the dramatist's or composer's original talent; and, consequently, that the author has a right (...) to some return for his work.<sup>1</sup>

However if a PLR were granted by copyright law in Canada to literary, dramatic and musical works, it would be difficult not to extend it to records, films, filmstrips, and all copyright material presently loaned by libraries. More importantly, the provision of such a right by copyright law would result in royalties being paid to owners in foreign countries with no assurance of corresponding royalties being paid to Canadian owners for the lending of their material in convention countries. This would further reinforce Canada's net-importer status. It is therefore evident that a PLR should not be provided by means of a copyright law.

On the other hand, if such a right is considered desirable as a property (or personal) right, a certain jurisdictional problem arises: Canada is a federal state. The Scandinavian countries and Britain are unitary states, and the single governments in those countries control all legislative jurisdiction over "copyrights" but, in Canada this jurisdiction would not extend to PLR if it were a right apart from copyright. As a species of property right, PLR would be exclusively within provincial domain.<sup>2</sup>

The feasibility of a PLR would have to be studied in detail by the provinces and, as this Paper deals with federal copyright law, the question falls outside the parameters of the present discussion. Given that the federal government would not legislate in the field of PLR, and assuming that some or all of the provinces introduced PLR legislation, interprovincial agreements would be necessary, and many other problems would have to be resolved. For instance, the paramountcy doctrine dictates that the provincial legislation must not interfere with or compete with the federal law of copyright.

If it is socially desirable to further assist authors by providing a PLR then it is suggested a means other than copyright should be found. It is noteworthy that all the countries providing a PLR, only West Germany does so through copyright legislation, and then only in respect of lending for gain.

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1. Wilson, Angus: A matter of Justice; in Public Lending Right - A Matter of Justice, op cit, p 24.
  2. An additional complication is that municipalities in Canada are under provincial jurisdiction. Municipalities, with the aid of provincial grants, maintain libraries, whereas in the Nordic countries and England the central governments are responsible for libraries.

The encouragement and development of arts and culture in Canada, and the creation of a milieu within which such can occur is of great importance. However, it has been stressed that copyright has economic as well as cultural implications; any decision should be made in accordance with the general principle that the net importer status of Canada should not be aggravated.

It is possible however that a program based on the Australian model could be introduced in Canada. This would provide a mechanism for achieving equitable remuneration for Canadian authors, as payments would be related to the use made of their books.

*RECOMMENDATIONS:*

That a PLR not be provided in a revised Copyright Act.

B DROIT DE SUITE

The term droit de suite can be translated as the "following right" or "consequential right". The right, where granted, is a means by which the creator of an artistic work can share in the proceeds of successive sales of the original of that work, after its initial sale.

The rationale for droit de suite is that an artist who creates a single piece of art and then sells it, should be able to participate in the proceeds from subsequent sales of the work.

The "right" is not provided in the Copyright Act. No provisions are made in the UCC or in the Rome Text (1928) of the Berne Convention, but the Brussels Text (1948), in Article 14 (bis), provides for the possibility of a droit de suite: participation in the proceeds of any sale of an original work of art or original manuscript of writers and composers, subsequent to the first disposal by the creator. The (inalienable) right can be claimed only to the extent that the author enjoys such protection in his own country.

The right, limited to originals of fine art, originated in France<sup>1</sup> and spread to legislation in a few other countries. Where provided, the right falls into one of two categories, permitting the author either (a) to share in the selling price, or (b) to share in the increment in value. France and Belgium are two countries which have implemented system (a); beneficiaries are the artist and his heirs during the term of copyright. The system applies where works are sold by public auction in both countries and in France, through a dealer. In France, an artist must be registered in order to participate. France accords the right only to foreign authors on the basis of reciprocity but, in practice, it may also be accorded, under certain conditions, to nationals of non-reciprocating countries; Belgium protects only "recognized" artists, i.e. Belgium and French nationals.

In West Germany, an amendment to the Copyright Law, effective

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1. Law of 1920; now Art 42 of the French Copyright Act, 1957.

January 1, 1973,<sup>1</sup> provides in greater detail certain "consequential rights", (i.e.: following the first sale), whereby an artist receives 5% of the sale price of an original work of art (including paintings and sculptures). Where an art dealer or auctioneer participates in the sale, it is the vendor who pays.

In their views expressed to the Department, artists favoured the provision of a droit de suite, arguing that, as the reputation of an artist increases, he should share in the increased sale value of his works.

It was suggested that the author's share should be in the form of a tax paid by the purchaser, being remitted to a collective agency and distributed to the individual artists. It was also recommended that, for the sale of foreign art in Canada, an excise tax should be levied, which would be paid to the collective agency for the general support of artists and art in Canada. It was advocated that the right be inalienable, and that the rate of remuneration be based on a percentage of the selling price.

Aside from the practical and legal difficulties, the ease of evading the right, and a certain degree of incompatibility with the property rights system,<sup>2</sup> there remains the difficulty of ensuring that the right would apply (in the absence of material reciprocity) only to Canadian creators. It would appear that, in the Berne Union, the provision of the right is optional and can be based on strict reciprocity in certain cases.

The acceptance at the international level of droit de suite was achieved only subject to the condition of strict reciprocity. Thus, the right can only be claimed "if legislation in the country to which the author belongs so permits and to the degree permitted by the country where this protection is claimed" (Brussels Text (1948), Art 14 (bis), para 2).

While the Brussels Text creates the potential for providing the right on a reciprocity basis, the Rome Text (1928) is silent. Therefore, Canada would be required to respect Art 4(1) of the Rome Text, which states that a right given to an artist in his work must be extended to convention nationals, even without reciprocity. In that respect, it would not be in Canada's best interests to provide such a right.

*RECOMMENDATION:*

*That a droit de suite not be provided in any new Copyright Act.*

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1. The amendment was necessary in light of the refusal of dealers and auctioneers to provide information which would enable enforcement of the right.
  2. Ownership of the work would be subject to the "lien" on it held by the author.

## C DOMAIN PUBLIC PAYANT

This concept, unknown in the present law, envisages that after the expiration of the term of copyright protection, payment of royalties for the publication or public performance of works should continue for the purpose of establishing funds for various purposes such as aiding needy authors and their families.

There are no treaty provisions dealing with domaine public payant. A number of countries apply the concept, including Uruguay, Bulgaria, Italy, Rumania, Yugoslavia, Russia and, to a certain extent, France. The works to which it applies vary as do the uses; duration is perpetual, except in Bulgaria where it expires twenty years after a work falls into the public domain.

The extension of protection, for whatever purposes, beyond the provided term, is inconsistent with the provisions for certainty of term. Furthermore, the Canadian copyright system would regard such a mechanism as incompatible with the position that the use of public domain material is free of charge.

## RECOMMENDATION:

*That no provision be made for domaine public payant in any new Copyright Act.*

## D USE OF COPYRIGHT MATERIAL IN INFORMATION STORAGE AND RETRIEVAL SYSTEMS

One problem raised by computer technology is the extent to which the use of copyright material - for input to a computer or output therefrom - should be permitted without authorization of the copyright owner, and which of such uses should require permission and the payment of a royalty. The present Canadian Copyright Act does not advert directly to this problem and as such is not amenable to analysis for purposes of finding solutions to the problem.

The Economic Council recommended that

no special new provisions for the payment of copyright royalties, over and above those already imbedded in the initial purchase price of a protected work, be attached to a computer input, that such provisions should be attached to certain types of computer output where the case for payment of royalties is clear. Other types of computer output where the case is not clear should be referred to the proposed copyright advisory committee for study.<sup>1</sup>

The Council drew an analogy to a library, stating that it is not relevant for copyright purposes that, incidental to its operation,

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1. Economic Council Report, op cit, p 167.

a library may employ mechanical aids, such as indices and desk calculators.<sup>1</sup> In that context, the Council stated that "the much discussed question of the copyright status of computer input seems to become virtually a non-problem."<sup>2</sup>

On the other hand, the Council did not doubt that, when attention turns to computer output, information storage and retrieval systems (ISRS) appear to be playing a role more analogous to a bookseller, particularly if the following two conditions are met:

- a) the work is in its original form of expression or in one of the general classes of adaptations of original form that are enjoying copyright protection now;
- b) the medium of delivery is more or less permanent and reusable, or directly activates a revenue-producing performance of some kind.<sup>3</sup>

It appears that the Council presumed compliance with these conditions when it said that, in certain types of output, the case for payment of royalties is clear.

It is submitted, however, that the library analogy dismisses perhaps too readily the problems of input, and that the hypothetical solutions proposed with regard to output must be more precisely stated if they are to have a greater effect than mere guidelines.

Neither the Berne Convention nor the Universal Copyright Convention specifically envisage the use of copyright material by computers. Even the latest revisions did not advert to the particular issue of information systems as they applied to the use of copyright material. However, the same revisions have specifically provided an undefined "right of reproduction".

It would thus not be a requirement of any new Act that it adopt any specific solution to this problem. However, it must be kept in mind that there is a general requirement that any new right granted to Canadians with respect to convention works must also be granted to foreigners.

In other jurisdictions there is little law directly on the point. It would seem that the right of reproduction would be broad enough to allow the interpretation that unauthorized input into a computer constitutes an infringement. For example, under s 3(1) of the Canadian Act, one of the sole rights of authors is to "reproduce the work ... in any material form". This formulation could be interpreted as including material used by or in a computer, as it does not specifically say that the reproduction must be perceptible to the human senses.

In the United States no provisions are made in the present law nor in the new law, effective January 1, 1978, but a commission was recently appointed to study and compile data on the reproduction and

1. Economic Council Report, op cit, p 167.

2. idem, p 168

3. ibidem, p 169

use of "copyrighted" works in conjunction with automatic information retrieval systems and various forms of machine reproduction. Indeed, the need for further study is acknowledged in this Paper and it will be recommended that such studies be actively pursued.<sup>1</sup> In the meantime, however, there remain practical problems for those who are either using copyright material or are concerned that their works are being used.

The use of copyright material by an ISRS can be characterized into four basic operations: input, storage, retrieval, output. Each category raises particular problems.

The input can only be made after the work has been translated into computer language. Such "translation" could be said to be permissible only with the authorization of the copyright owner. Similarly, storage can be regarded as an "adaptation" of the copyright material to magnetic tape format. Retrieval of copyright material from storage could be likened to a "performance in public". Finally, output could be considered a "reproduction" similar to photocopying.

The above are but the most obvious problems raised in considering the impact of ISRS on copyright. There are also more subtle problems such as those arising from the nature of the material being used, either as input or output, most notably in the form of abstracts or microformats distinguishable from the actual program. In fact, the copyright material "input" may be, and probably is, significantly different in its form of expression from the original material from which it is derived. The main function of ISRS is to disseminate information, not works; what is finally processed is ideas, e.g. abstracts, indices. Traditionally, it has been recognized that ideas cannot be protected by copyright - they are free. Thus ISRS creates a problem by attenuating the traditional distinction between ideas and the expression of those ideas.

Another difficult question arises when new, and presumably superior, data become available, which contradict information in a copyright work already stored. Who should be permitted to insert the corrected data in the work? If someone other than the author does it, this presumably violates the integrity of the author's work.

However basic the questions outlined above may appear from a copyright point of view, they are theoretical. While the Council's warning of dealing with rapidly moving targets and constantly changing situations should be kept in mind, the immediate problems do not appear to be as complex as indicated above.

Those who made recommendations to the Department concentrated on the two most obvious aspects of ISRS operation: input and output. Thus, it was recommended that any revision of the Act be so worded that the author's right to control the input of his work into a computer system be clearly preserved and capable of being separately assigned, and, at the other end of the computer operation, that all printouts of parts of a work be recorded, and that a royalty be paid. Copyright owners themselves envisaged the possibility of someone unreasonably withholding published works from computer use, and recommended that there

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1. See Part IV, p 233, below.

be a provision for application to a judge or some other impartial body to compel release for computer use. Following the procedure suggested, the onus would be on the computer community wishing to use the work to prove that the withholding of a particular work was contrary to the public interest and that the copyright owner was acting unreasonably.

Few briefs were received arguing against any copyright protection where a work is used in an information system. Those who did oppose the granting of such protection argued that no special permission should be necessary in order to add machine readable information to the existing range of mechanical aids already used to make knowledge and data available to the public.

It was cautioned that copyright law should not operate to inhibit the continued development of information storage, transfer, and retrieval technology in Canada. However, the majority of those who were concerned with this aspect of access to information felt that the necessary safeguards could be provided by compulsory licensing schemes (to be devised) rather than by refusing protection to copyright owners.

In any event, as has been said earlier, it is apparent that the practical copyright problems now raised by the operation of computers really center on two possible exclusive rights of the creator: the right to input, and the right to output. With respect to both, their pros and cons have been abundantly discussed in specialized literature, and it is not proposed here to re-evaluate the arguments. Rather, it is proposed to consider the two rights in the context of the balance that must be achieved between the needs of creators and the necessity of not hampering the development of computer technology in Canada. Moreover, the following brief discussion is presented in the light of the previously stated objective: to provide beginnings of solutions pending further study.

#### 1. The Right to Control Input

Should the right to input be granted exclusively to the author, it would undoubtedly give rise to negotiations culminating in the payment of royalties. However, the royalties would not be sizeable enough to jeopardize the viability of the new technology. Moreover, there is no reason why a change in technology per se should reduce the rights of creators. However, the negotiation process could pose a threat to a technology for which speed is of the essence. Surely society's need to maintain an efficient and rapid system of information processing is as reasonable as the creator's need to know and control the uses to which his work is being put.

It therefore appears that, short of a compulsory licensing system whose feasibility and effect are impossible to determine at present, the only way of meeting both reasonable demands would be to grant the copyright owner the basic right to know how and by whom his work is being used, without allowing him to slow down the processing of the information contained in his work by forcing the processor to enter into negotiations for the use of that work. Of course, to be effective, the right would have to be protected by a sanction against operators of information systems not reporting use of the copyright owner's work in their system. Moreover, it would be appropriate that any new Act specify that basic copyright principles are not to disappear because of the emergence of a new technology. Thus, there is no reason why

the processing by ISRS of an unpublished work should be permitted without the consent of the copyright owner.

#### 2. The Right to Control Output

There is little dispute that computer output should fall under copyright control if there is a printout of copyright material. In fact, this principle is now so accepted that some ISRS are already paying royalties to copyright owners, even though the work has not in fact been reproduced, but merely identified as the result of a computer search.

Moreover, it is not evident how, at the output stage, negotiations with the copyright owner could impede the information processing system to any extent. The information processor will have been able to manipulate the information without interference. Where use by an ISRS results in a reproduction of the work, it would be unjust that the copyright owner be deprived of the benefits of its creation.

On the other hand, there is a need for specifying the forms of output that are to be subject to copyright protection. For example, it was decided in the Canadian Admiral case<sup>1</sup> that the line by line production of a fleeting image could not be considered a copy. Problems arise when the computer output of the copyright work is in the form of a television or cathode ray tube display. It is submitted that a new Act could easily clarify these situations.

#### RECOMMENDATIONS:

1. That unauthorized recording of unpublished copyright material for use in an ISRS constitute an infringement.
2. That the making of a contrivance embodying published copyright material for ISRS purposes, and its input into an ISRS, not constitute infringement, subject to a right of discovery, as indicated in recommendation 3 hereafter.
3. That there be a statutory right of discovery whereby a copyright owner may compel disclosure of whether any of his copyright material is or has been stored in an ISRS.
4. That where, after the expiration of a period to be fixed by regulation, there is a failure to answer a request for discovery or there is a false answer given to that request, the storing of copyright material in an ISRS become an infringement subject to all remedies afforded by the Act.
5. That the unauthorized output by an ISRS of legally stored copyright material, whether effected by printout, cathode ray tube display, or otherwise, constitute an infringement.

<sup>1</sup> Canadian Admiral Corporation v Rediffusion Inc., (1954) Ex. C.R. 382

## E CABLECASTING RIGHTS

Cable television is a system in which television signals are amplified and distributed by cable companies to subscribers for a fee. This, the most important present function of cablevision, is known as "simultaneous rediffusion". Originally intended to facilitate reception of local television signals by cooperative community efforts,<sup>1</sup> the concept has been replaced by the commercial cablevision operation, which provides subscribers not only with improved reception of local signals but with distant signals which they would not otherwise be able to receive. Cablevision is also capable of originating programs (a function known as "diffusion"). by presenting on its own reserved channels, either pay-TV<sup>2</sup> or programs produced by the facilities of the cable system.

Under the current Canadian law, the simultaneous rediffusion by cable of broadcast signals is not protected by copyright as it is not "broadcasting", "radiocommunication",<sup>3</sup> or a "public performance".<sup>4</sup> In fact, Canadian cable systems do not presently pay copyright royalties for the simultaneous rediffusion of broadcast signals to subscribers.<sup>5</sup> The issue, then, is what rights, if any, should be granted in respect of cablecasting operations. Should cablecasters have a right in their cablecasts? Should those whose material is being used by cablecasters have a right to prevent such use?

### 1. International Developments

The Rome Text of the Berne Convention imposes no obligation to protect works against the simultaneous rediffusion of broadcasts of such works. Later texts, however, provide authors the exclusive

1. i.e. Community Antennae Television (CATV).
2. A system requiring the subscribers to pay on either a program or program series basis, usually motion picture films or sporting events.
3. The Interpretation Act, SC 1967-68 C 7, s 28(3), defines "broadcasting" as "any radiocommunication in which the transmissions are intended for direct reception by the general public", and "radiocommunication" is defined as "any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than three thousand Gigacycles per second propagated in space without artificial guide."
4. Canadian Admiral Corporation Ltd. v Rediffusion Inc. Ltd., (1954) Ex. C.R. 382.
5. However, where a cable system records on videotape the broadcast of a dramatic work for later diffusion, it infringes the copyright in the work embodied in the original broadcast, by reproducing that work without authorization: (Warner Bros Seven Arts Inc. et al v CESM-TV Ltd.; (1971) 65 C.P.R. 215; Ex. Ct. January 25, 1971)

right to authorize "any communication to the public, whether over wires or not, of the radiodiffusion of the work". The UCC makes no provision with respect to rediffusion.

The copyright problems posed by cable operations have become a matter for review at the international level. At the 1975 joint meeting of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention, the subject was first taken up for discussion. The discussion arose in part from recent case law in Europe, most notably a 1975 decision in Belgium, the Coditel case, in which it was held that the simultaneous rediffusing by a cable system of a foreign broadcast of a motion picture film was an infringement of the copyright in the film.<sup>1</sup> It is not certain, of course, that this example would be followed in other European countries. Indeed, case law in France seems to be leaning towards narrowing the right granted to authors by Article 11 (bis)<sup>2</sup> of the Berne Convention.

The issues of cablevision have only been dealt with to any great extent in the USA. The US experience with cablevision will be discussed here in more detail, since that country has a technological system and related problems similar to those of Canada.

The present US (1909) law does not specifically cover cable operations. Still, various actions have been brought by broadcasters seeking to protect their interests in television programs. The basis of the actions varied from contract to copyright and unfair competition.

Cablevision was the subject of spirited debate during hearings on the general US copyright revision bill which, in 1965, would have imposed full liability upon cable systems. The provision was supported by copyright interests and opposed by cable interests which urged that their operations should be completely exempt from copyright liability, unless they originated programming or acted as a "Pay-TV system".

Subsequent legislative proposals have ranged from imposing full liability through intermediate steps, to proposals for complete exemption for cable interests.

In two major copyright cases,<sup>3</sup> the US Supreme Court held that cable use of broadcast signals, whether local or distant, did not infringe copyright. In spite of these decisions, however, the real issue remains whether cable systems should pay owners of copyright for the use made of their material.

1. The cable system in question had sixty thousand subscribers. Its function was to pick up and relay video signals from a number of European countries; the system paid no royalties but did charge subscribers for the services.
2. See Dubois H. and Françon A.; Copyright and the dissemination by wire of radio and television programs, in RIDA, vol. LXXXVI, Oct. 1975; p 3.
3. Fortnightly Corp. v United Artists, 392 US 390 and Teleprompter v CBS, 415 US 394.

It is noteworthy that the US cable interests have stated that "it has been apparent for years that the ... industry is going to pay copyright (royalties)", and that "it is a fact of political life that copyright liability will be imposed ...".<sup>1</sup> The view was taken that "the industry will remain stagnant until this question is resolved by passage of CATV copyright legislation.<sup>2</sup>

As a result of compromise between cable and copyright owners, the 1978 US Copyright law will provide for the granting of a compulsory licence with respect to copyright material contained in broadcast television programs rediffused by cable systems. The solution has some interesting features.

In its Report to the House of Representatives on Copyright Law Revision,<sup>3</sup> the Committee considering the law was of the view that cable systems which carry copyright material should pay royalties.<sup>4</sup> The Committee decided upon compulsory licensing "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry".<sup>5</sup> The solution was primarily aimed at the retransmission of distant non-network programs.

With respect to foreign broadcasting signals the Committee considered that the solution of compulsory licensing did "not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country",<sup>6</sup> and that "a broad compulsory licence scheme for all foreign works does not appear warranted or justified".<sup>7</sup> In respect of a signal of a British, French, or Japanese station the Committee was of the view that full copyright liability would apply.<sup>8</sup>

However, with respect to Canadian and Mexican signals the Committee found "that a special situation exists regarding the carriage of these signals by US cable system".<sup>9</sup> The Committee was of the view that with respect to Canadian signals the compulsory licence "would

1. "Regulation and Copyright - Where We Stand" - National Cable Television Association, Inc. President's prefatory letter, July 10, 1970.
2. *idem*
3. Report from the Committee on the Judiciary, submitted to the House of Representatives; September 3, 1976; 94th Congress, 2nd Session; Report No. 94-1476.
4. *idem*, p 89
5. *ibidem*
6. *ibidem*, p 94
7. *ibidem*
8. *ibidem*
9. *ibidem*, p 94

apply in an area located 150 miles from the US - Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater".<sup>1</sup> The Committee emphasized that cable systems operating within the zone were fully subject to the payment of royalty fees within the provision of the compulsory licences.

Thus, the national treatment basis of the Universal Copyright Convention, of which both Canada and the United States are members, has been used with the rather peculiar effect of discriminating against Canadian broadcasts, by subjecting them to compulsory licensing provisions but, at the same time, not so subjecting the signals of any other country, except Mexico.

US cable systems will be required to pay a percentage of their receipts into a central fund to be divided among copyright owners of record. Rates, while to be set initially by law, will be subject to periodic review by a Copyright Royalty Tribunal.

## 2. Communications Policy or Copyright Policy?

Communications policy encompasses broad areas, one of which is broadcasting. That policy, in its regulatory aspects is expressed through the Canadian Radio and Television Commission (CRTC).

Cable systems operate subject to approval by the CRTC and are subject to regulation by the CRTC; the Broadcasting Act requires operators of cable systems to apply to the Commission for a licence to operate.

The CRTC considers cable systems to be an integral part of the Canadian communication process and, in 1971, issued a major policy statement on cablevision<sup>2</sup> to support that view.

The Commission noted that cable systems do not contribute to the cost of production of the programs they use, and suggested that they pay for the Canadian programs taken. Their conclusion was that "some method must be derived for cable television to make financial recognition of (the) fact"<sup>3</sup> that they do not pay for the programs sold to subscribers. In short, the relationship between TV stations and cable systems was identified as one between supplier and user.

The CRTC considered the role of copyright "somewhat limited in the context of the television-cable television relationship and in some respects it might be detrimental to look solely to copyright as a systematic solution to the problem of achieving equity between these two segments of the broadcasting system".<sup>4</sup> On the other hand, the CRTC recognized that copyright should ensure "that right holders received their fair share"<sup>5</sup> from a payment system where cable operations pay TV stations for programming used.

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1. Report from the Committee on the Judiciary, op cit, p 94.
  2. Canadian Broadcasting, "A single system", CRTC, July 16, 1971, p 1.
  3. idem, p 20
  4. ibidem, p 22
  5. ibidem

As mentioned above, there is no law in Canada at present which prohibits the rediffusion of broadcasts by cable systems. It is suggested that the orderly development of broadcasting in Canada, consistent with the social and cultural goals of the country, can be endangered as much by uncontrolled rediffusion as by uncontrolled broadcasting.

It is manifest that cable systems should be an integral part rather than a competitor of the regular television broadcasting system. The question is, then: is it a legitimate aim of copyright law to serve as a means of forcing the cable system into the service of the regular television broadcasting system?

Unfortunately, implicit in this approach to the question of extending copyright principles to cable systems is an undermining of the basic 'property-like' nature of copyright. Yet, to simply refrain from extending copyright to cable systems in order to leave the field clear for communications legislation, also undermines the quality of the basic right of creators.

It is suggested that copyright problems raised by the operation of cable systems should be resolved within the parameters of copyright *per se*, despite the cable industry view that the CRTC is the best mechanism for adjusting the relative positions of cable television companies and owners of works transmitted by telecommunication. However, it will be necessary to take into account the conditions under which cable systems are permitted to carry signals and the effects of requiring them to make payment to carry such signals.

Furthermore, it will be necessary to consider the mechanisms through which broadcasters might be protected or compensated as a result of any competitive threat posed by cable.

The rediffusion of distant signals by cable systems offers a greater variety of programming to subscribers, but is recognized by both broadcasters and copyright owners as being seriously competitive with the local broadcasting organizations. It is said that this activity fragments local audiences to the detriment of local stations; that it competes unfairly with broadcasters, both local and network, because distant signals picked up by cable systems are "free": no payment flows to the originating broadcaster or to the copyright owner.

Local broadcasters, on the other hand, are prohibited by law from picking up and relaying broadcast material without CRTC permission. As they must originate all of their local programming, and because the right to broadcast is one of the exclusive rights of the copyright owner, local stations are required to pay royalties.

An additional complication is that the CRTC determines what channels, both local and non-local, a cable system may carry in a particular market. The CRTC may also prohibit the system from duplicating programs aired at the same time by local broadcasters.

These factors are in the strict sense of little or no concern to the basic issue of copyright but they will have to be taken into account in the formulation of any government policy in the broad area of communication. Of course, that policy in turn will bear heavily on any final copyright policy decisions.

### 3. The Copyright Questions

The copyright questions raised by the operation of cable systems are: what rights, if any, should be granted (1) to cablecasters who originate programs, and (2) to those whose material is being used by cablecasters.

The granting of rights will necessarily result in the payment of copyright royalties. Therefore, the question restated is: should cable systems pay royalties and, if so, under what circumstances?

#### (a) Should cable systems pay royalties?

Cable operators in Canada oppose paying royalties.<sup>1</sup> The cable industry called attention to Canada's international commitments: it was the industry's view that, because of Canada's participation in international copyright conventions, a copyright that would include the right to authorize diffusion or simultaneous rediffusion of a work would have to be extended to all those protected under the conventions. If so, the ensuing payment of royalties would, of course, further aggravate Canada's international copyright balance of payments. However, the industry did not consider the possibility of limiting royalty payments to Canadians, which<sup>2</sup> is discussed under the heading "Rediffusion right in broadcasts".

The industry also stressed two facts: first, that the cable industry had developed and was shaped in light of the economic implications of existing copyright law; and second, that the Economic Council found no evidence to support any substantial increases in existing levels of copyright protection. However, the view that cable industry should pay copyright royalties in certain instances has in fact been supported by the Economic Council and in a somewhat less clear fashion by the Ilesley Commission. In general, the Economic Council felt that "each user should pay his fair share"<sup>3</sup> and that "compensation should be in proportion to use".<sup>4</sup> In order to relate these principles to cable operations, a distinction must be made between the two functions of "origination of programs" and "simultaneous rediffusion of broadcast signals".

1. However, on August 29, 1972, the Toronto Globe and Mail reported on a statement of the then chairman of the Canadian Cable Television Association:

"...it is my view that we should pay all legitimate expenses and I think copyright is one of them. It will remove an uncertainty and enhance our ability to raise capital. Why shouldn't the people who create the material get something for it?"

The broadcasting industry has survived nicely paying for it. It's the same with all other sorts of taxes. We shouldn't be paying any more or less. The key is the immense amount of capital we need to raise and this requires stability."

2. See p 142, below.

3. Economic Council Report, op cit, p 141.

4. idem, p 141

## (i) Origination of Programs

Consistent with the statement that each user should pay his fair share, the Economic Council stated that originators of programs for cable diffusion should be in the same position as broadcasters, for copyright purposes.<sup>1</sup> Indeed, where he originates programs, the cable operator performs a function analogous to that of a "broadcaster". This is not in issue. It is clear that in such instances negotiation for permission and payment of copyright royalties should be the norm.

This would be directly provided for in a copyright law by granting to copyright owners a "diffusion right" (not to be confused with the "broadcast" right), giving them the sole right to authorize the diffusion of their material in addition to their present sole right to authorize the broadcasting of their material.

Similarly, if, with respect to origination, the cablecaster is to be assimilated with the broadcaster, it would seem fair that he enjoys in his cablecast the same rights a broadcaster enjoys in his broadcast.

## (ii) Simultaneous Rediffusion of Broadcast Signals

The principal argument against payment of royalties for this function is that cable systems do nothing more than improve the subscriber's reception. If cable systems were required to pay royalties for simultaneous rediffusion of programs, discrimination would arise between those who require cable service to get good reception and those who do not.

It is also possible to maintain that broadcast content is something that is impossible for a cable operator to know in advance. Because of this, blanket advance clearances could not be obtained and a clearing house system could result in placing cable operations at the mercy of copyright owners.

Another argument is that copyright owners are already receiving royalties, as originating broadcasters now pay on the basis of a percentage of their gross revenue, which of course depends on the ultimate size of their audience, including cable subscribers.<sup>2</sup> In other words, cable systems expand the advertising revenue of broadcasters and therefore the royalties of copyright owners. This argument may be true with respect to the payment of royalties for the use of musical works by private broadcasters, but royalties for the use of other works (e.g. broadcasting of films, plays, etc.) are not necessarily based on a percentage of the broadcaster's gross revenue. Even for musical works, the (public) Canadian Broadcasting Corporation pays royalties on a per capita basis (for Canada's total population) and not according to its gross revenue.

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1. Economic Council Report, op cit, p 177.

2. This argument is based on the fact that the Copyright Appeal Board annually approves the royalties that performing rights societies (CAPAC and BMI Canada) are to collect from users of the protected material which form their respective repertoires. Traditionally, the tariffs presented to the Board by these societies with respect to radiocommunication of their works by private radio stations has been a percentage of each station's gross revenue.

The main argument in favour of payment of royalties by cable systems is that they are now more than a mere service, having gone beyond a mere community effort to improve the quality of reception. A cable system now transmits programs in somewhat the same fashion as a broadcaster and, in addition to taking a "free ride" on those broadcasts, makes a direct charge for the reception of its transmissions. Copyright owners are unable to control their works, and cable use can cause the loss of a potential market by covering an area where a program is not then intended to be received. Such loss is multiplied by the number of systems throughout the country utilizing the broadcast. It is suggested that cable systems neither need nor deserve such a "free ride" at the expense of copyright owners, and to the detriment of local stations and other users who have to pay royalties.

The Ilsley Commission was opposed to creating a right of authorizing "rediffusion" of works. The Commission stated:

Where the author authorizes a broadcast he should be deemed to authorize its broadcasting in a wide sense ... The author in our opinion should not be entitled to prevent the rediffusion if he has authorized the broadcast. The position is not clear with regard to those who are not within the range of the broadcasting station and to whom the broadcast is rediffused. However, in such a case the royalty or fee paid by the broadcaster to the author or head-copyright proprietor will presumably be based upon the extent of the listening audience whether this audience is within the range of the broadcast or is reached only by rediffusion. Consequently there would seem in this case as well as in the other no justification for an additional fee collectable from the rediffusing body.<sup>1</sup>

This argument, of course, is raised by the cable systems, as discussed initially above.

It is understandable that those who have a direct interest in cable systems operations, either as cablecasters or as copyright owners whose material is being used by cable systems, would have uncompromising views on whether or not cable should pay royalties. It is suggested, however, that the public interest would be best served by balancing these two opposing views in order to reach a compromise solution. This was the position taken by the Economic Council which recommended that cable systems pay copyright royalties in certain well-defined situations only.<sup>2</sup>

Of course, should cable systems be required to pay royalties for simultaneous rediffusion, it is to be expected that this new "cost" would be passed on to the subscriber. This, in itself, could be an argument in favour of exempting cable systems from payment of royalties in order not to burden the consumer with added costs. The argument, however, appears exaggerated. Although it is reasonable to assume that cable systems would attempt to pass on any added cost to the subscriber, such action may not be possible. For example, the CRTC might prohibit cable operators from raising their fees to cover the cost of royalties.

1. Ilsley Report, op cit, p 28.

2. See p 138, below.

Even if the CRTC chose not to supervise fees charged by cable systems, and the cost of royalties were passed on to subscribers, it is not certain that the increase in cost to the consumer would be so great as to warrant an exemption for cable use of copyright material.

However, cable subscribers would no doubt bear some of the costs of paying royalties to copyright owners whose material is being diffused by cable systems. In essence, the argument against a payment of royalties for simultaneous rediffusion is not an argument against the principle of payment; rather the opposition appears to be based on the amount of payment perceived as likely to be faced by subscribers. It is suggested here that the added cost to subscribers for payment of royalties in respect of simultaneous rediffusion would be minimal, if it is at all passed on to subscribers. Obviously the cost to the subscriber would be a function of the amount of royalties paid by cable systems. If cable systems were to pay royalties only in certain instances, it is clear that only a limited cost would be passed on to the subscriber.

In conclusion, it is submitted that broadcasters should not have to pay royalties for both their own use of copyright material and for cable use of copyright material. Cable operators, like any other users, should be responsible for negotiating for permission to use material protected by copyright. This, of course, would be consistent with the Economic Council's guideline that "each user should pay his fair share".

The cable industry's final argument is that payment of royalties for all simultaneous rediffusions would add to Canada's imbalance in international payments of copyright royalties. This problem could, of course, be met by limiting wherever possible the payment of royalties to certain rediffusions, as discussed in the following section.

#### (b) Royalties for simultaneous rediffusion

A number of solutions to the international imbalance of copyright payments are possible, and will be discussed in turn.

##### (i) The Economic Council's Solution

The Economic Council emphasized the need to take full advantage of new communications media and institutions to distribute information to users in the most efficient way. The Council adopted the view that a private right to exclude is an unnecessarily costly technique to guarantee financial reward, and opted instead for compulsory licensing whereby, in its view, public access and private compensation were both ensured.

The Council recommended that broadcasters have the exclusive right to record and retransmit their broadcasts, except where simultaneous (or time-zone delayed) retransmissions of the complete program is effected by a cable television system.<sup>1</sup> The Council further re-

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1. Economic Council Report, op cit, p 157. The recommendation assumes the provision of an ephemeral recording right for cable systems in order to enable them to take advantage of the exception. The existence of cable systems with time-zone problems is unknown. Moreover, it is difficult to see how delayed rediffusion is in any way different from origination.

commended that a cable system not pay copyright royalties for simultaneous (or time-zone delayed) rediffusion of the unaltered complete broadcast program, i.e. the program inclusive of advertisements (commercials). However, the Council did recommend that a cable system be liable for payment of copyright royalties where the cable system deletes the commercials or where the broadcast program does not contain commercials.

The Council's opinion was that supervision by a central body might be necessary and that, where cable systems are obliged to pay for copyright, there could be a system of compulsory licensing or negotiated arrangements with the program originator.<sup>1</sup>

The Council felt that the presence of advertising was the prime determinant of whether payment should be made to the copyright owner, but it is difficult to reconcile this position with the Council's previous guidelines that "compensation should be in proportion to use and each user should pay his fair share".<sup>2</sup> Each cable system is a user and each subscriber is also a user. To say that payment should be governed by use on the one hand and by advertising on the other appears contradictory.

The Council stressed that a cable system does not compete with a broadcaster for advertising revenue. This position is similar to the Ilesley Commission's view which implied that a broadcaster whose signals were being rediffused by cable should be expected to pay a higher rate to the copyright owner because he could demand more from sponsors. In fact, the Economic Council Report suggested, further to this premise, that advertisers could and should be charged higher rates, since they would benefit from the rediffusion through extended market coverage. The increase would ultimately be passed on to copyright holders who could negotiate larger royalties.

It is submitted, however, that there is no reason why a broadcaster should act as bargaining agent on behalf of copyright owners. Furthermore, even if a broadcaster did obtain a better price from a sponsor, on the grounds of increased coverage, there would be no guarantee that such increase in revenue would be passed on to copyright owners.

In addition, from the program sponsors' point of view, certain of those advertisers do not value the extended coverage provided to them by the cable system and do not wish to pay higher costs for unsought increased coverage. The Economic Council suggested that sponsors who did not value wide coverage would "tend to be replaced by those who did and to go off in search of more suitable broadcasters or other media".<sup>3</sup> It is submitted that the social and economic implications of preventing small businesses from access to modern media must be well understood before such a view can be endorsed.

The Council's attitude departed from that outlined above where the cable system dropped advertisements, or where the broadcast system was a non-sponsored operation. In these situations, the Council suggested that:

1. Economic Council Report, op cit, pp 176-177.

2. idem, p 141

3. idem, p 176

some more formal arrangements for directing an appropriate stream of income back from the cable system to the holders of copyright in the broadcasts of the wireless system would seem called for. As a general principle, good incentive policies should normally try to remunerate information-processors in proportion to the number of consumers that they reach.<sup>1</sup>

It is obvious that the Economic Council believed copyright owners should receive value for their work in proportion to the number of persons to whom the work is disseminated. However it equated copyright owners with information-processors. This led to the assumption that incentive policies suitable for the information-processor should be applied mutatis mutandis to the copyright owner. Of course, it is not necessarily the function of the copyright law to encourage creators to produce for the widest common denominator.

The Council recommended that only partial copyright liability be placed upon cable systems. The justification for this limited liability appears to be a policy view that further distribution should be unhindered once the copyright owner has exercised his right to authorize the initial broadcast.

In considering these recommendations, cable rediffusion is but one additional mode of communicating the work. For the copyright owner's right of communicating his work to be meaningful, it should extend to all forms of communication. The initial exercise of the right to authorize a broadcast would be illusory if the copyright owner could not control the extent of the distribution of the broadcast of his work.

Any rediffusion of a broadcast involves a different originating centre for yet another dissemination of the work. It follows from this view that the author's consent should be required for the additional use.

#### (ii) Compulsory Licensing<sup>2</sup>

In general, the Economic Council was of the view that a private right to exclude is an unnecessarily costly technique to guarantee financial reward and that it should be replaced by compulsory licensing whereby public access and private compensation would both be secured. The Council suggested that a system of compulsory licensing could be arranged requiring cable systems to pay royalties.

The new US law, effective January 1, 1978, has adopted a compulsory licence system, primarily as a result of compromise. The effect of the introduction of such a solution in Canada is considered later. Only the principle of compulsory licensing is considered in this section.

An analogy has been suggested between a compulsory licensing system for cable use and the existing compulsory licence for mechanical reproduction of musical works. However, the mechanical recording compulsory licence did not arise from a public need for access to certain works; rather it arose to strike a balance between the

1. Economic Council Report, op cit, p 176.

2. See p 74 above for a more detailed discussion of compulsory licensing.

the claims of a recording industry whose growth took place during a period when the law did not provide a recording right in music, and the claims of composers who would have barred absolutely, without negotiation, anyone from making a recording of their work.

While the development of the cable industry in terms of copyright is somewhat historically analogous to the situation that gave rise to the introduction of compulsory licensing for sound recordings, it is not considered appropriate to arrive at a solution in the same way, simply on the basis of effecting a compromise. Nor can the analogy be extended too far. The compulsory licence provisions for the mechanical reproduction of musical works was introduced to protect a budding industry which might not otherwise have been able to pay negotiated royalties; the cable industry on the other hand is already firmly established. Furthermore, the sound recording industry, while using compulsory licensing as a means of access to musical works to make recordings for sale, still has to produce its own sound recordings. Cable systems, however, upon the introduction of compulsory licensing, would gain access to actual broadcast programs, which contribute the very service they sell.

### (iii) Signal Coverage

Another solution that has been advanced to make possible the payment of royalties for rediffusion would take into account the excess coverage over the intended coverage of local and imported signals.

Under this system, where a cable service duplicates the signal coverage of a local broadcast, no payment would be made; where the cable system extends the audience reached by the signal of the broadcast, provision for payment would be made only to the extent of the increase. The theory is that broadcasters pay royalties, through negotiations prior to broadcast, on the basis of broadcast revenue to be derived from the "normal" reception market area.

Making such a distinction would require "local signals" to be defined, taking into consideration certain criteria which might include: the normal reception area of the broadcast signal, the extent to which the cable audience is reflected in the broadcast revenues or rate-cards,<sup>1</sup> and criteria established by the CRTC with respect to its policies of blackout of distant signals.

Where distant broadcast signals are imported, payment would be made for their rediffusion. The rate of compensation would be set according to criteria determined by the Copyright Tribunal.<sup>2</sup>

Consistent with the Economic Council's recommendations, where commercials are deleted or substituted, the signal would be deemed to be "distant" and a royalty paid to the copyright owner. Again, the rate of compensation could be determined by taking into account (a) whether commercial advertising has been deleted or substituted; (b) whether there is additional revenue derived from substituted commercials; (c) whether there is increased audience by the addition of subscribers to the cable system; and (d) whether there is economic loss by reason of prerelease of the work in a distant market.

<sup>1</sup>. The local station's rate card and revenue are a function of the audience at prime time.

<sup>2</sup>. See p 222, below.

## (iv) Joint Payment by Broadcasters and Cablecasters

Another solution would be to require copyright owners and broadcasters, when negotiating for authorization to broadcast, to take into account the possibility of a broadcast being rediffused by cable systems. It is possible to envisage a provision in the copyright law requiring that any broadcasting fee negotiated between copyright owners and broadcasters reflect the larger audience reached by rediffusion of the broadcast signal. In turn, cable systems could be required, under the Broadcasting Act to reimburse the broadcaster for the additional cost of paying for the cable audience.

## (v) Rediffusion Right in Broadcasts

The main difficulty with all the foregoing solutions is the same: they do not avoid the immediate drastic increases in royalty payments to non-nationals. All the solutions require the granting of the same rights to all convention beneficiaries with respect to literary, dramatic, musical and artistic works, and motion picture films. In other words, the granting of a rediffusion right in convention material would have to be extended internationally.

It is submitted, however, that it is possible to arrive at a solution that respects Canada's international commitments and abides by the principles of copyright law, yet does not increase the present imbalance of international copyright payments.

It is recommended in this Paper that copyright protection be provided, by means of a right to rediffuse, to Canadian broadcasts, since they are not protected by the copyright conventions.<sup>1</sup> Protection under the recommendation is to be restricted to Canadian broadcasts incorporating Canadian material. This protection of Canadian broadcasts provides the basis for a solution with respect to cable operations: only Canadian broadcasts would be further protected by means of a rediffusion right.

The results of such a provision would be that Canadian broadcasters, with a rediffusion right in their broadcasts, would be in a position to require payment by cable systems for rediffusion of their broadcasts.<sup>2</sup>

It is essential in understanding this solution to appreciate the distinction made in this Paper between a broadcast per se, which is material not protected by the Copyright conventions, and the work embodied in the broadcast, which is material protected by the conventions. A rediffusion right attaching to convention works would have to be extended to non-nationals, but a rediffusion right attaching to broadcasts can be limited to Canadians alone.

This solution is in accordance with both the Berne Convention and the UCC, as they do not require the granting of a rediffusion right in convention material. The Berne Convention, however, does require the granting to authors of a right to authorize the broadcasting of their works.

1. See p 107, above.

2. It has been recommended elsewhere in this Paper that "Canadian broadcast" is to be defined by the CRTC. It is in respect only of such broadcasts that cable systems would be required to pay.

Following the solution outlined above, authors and copyright owners would not have the right to authorize the simultaneous rediffusion of the material broadcast but, consistent with the requirements of the Berne Convention, they would retain their right to authorize the broadcast of their material, thereby retaining their bargaining position.

Payment of cable systems could be made to a central body for distribution to broadcasters. That central body could be the Copyright Tribunal, which will also be responsible for establishing royalty rates for a variety of other uses. As the right would be granted on non-convention material only, its exercise could be made dependent on a number of conditions designed to ensure that Canadian creators receive their fair share of the royalties paid to broadcasters. Similarly, as payment would be fixed and supervised by the Copyright Tribunal, mechanisms could easily be developed to ensure the transfer of payment from broadcasters to Canadian creative elements.

The nature of the Copyright Tribunal, its function, scope and powers are discussed elsewhere in this Paper.<sup>1</sup> If the Tribunal is to be given the responsibilities envisaged in this section with respect to rediffusion, then the powers given to that Tribunal will have to be framed accordingly. In particular, it follows that the Tribunal will have the responsibility to create the conditions, procedure, and regulations to ensure that the royalties generated by cable systems for rediffusion of Canadian broadcasts are distributed in accordance with the objectives sought in granting a right of rediffusion: that Canadians receive their fair share of royalties. It follows that the Tribunal should have the necessary powers to fix the fees to be paid by cable systems and to establish the rules and regulations governing assessment, collection, receiving and distribution of such fees. These powers should be drafted to ensure that the intent of the proposed legislation is met.

It is not the intention of this Paper to discuss the details of such mechanisms, rather, it should be sufficient to establish a principle of payment which would not further aggravate Canada's net importer status. If the foregoing solution is adopted, then only Canadian interests will receive payment. It will be distributed within Canada and benefit the creative community; it will contribute to furthering the cultural objectives of the government, and to developing a strong Canadian communication system.

#### RECOMMENDATIONS:

*That in respect of the operations of cable system the following cablecasting rights be provided in any new Copyright Act:*

1. Diffusion (where cable systems originate programmes)

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.. See The Copyright Tribunal p 214.

- a) That copyright owners be provided a specific right to authorize the diffusion of their material by cable systems.
  - b) That cable systems be provided protection in programmes they originate, analogous to the protection to be provided to Canadian broadcasters in their broadcasts.
2. Rediffusion (where cable systems simultaneously rediffuse broadcasts)
- That Canadian broadcasters be granted a right to authorize simultaneous rediffusion of their Canadian broadcasts.
3. Regulation of rediffusion
- a) That, as the granting of the foregoing right will entail determining a basis for and the payment of royalties, appropriate regulatory mechanisms be established.
  - b) That the Copyright Tribunal<sup>1</sup> fix the appropriate fees and establish the necessary safeguards to ensure the equitable assessment, collection and distribution of royalties to Canadians.

#### IV EXCEPTIONS TO COPYRIGHT PROTECTION

As was said in Part I of this Paper, probably the most difficult and sensitive issue of copyright law revision is that of striking a balance between the interests of creators of copyright material and the users of such material. The issue is most apparent when users seek increased and new derogations from the rights of authors.

In discussing the issue, it is proposed to deal first with exception to copyright protection in general, by setting out the opposing interests involved; then to deal with the exceptions presently contained in the Canadian copyright law; and finally, to deal with the question of additional exemptions that might be included in a new Act.

##### A EXCEPTIONS IN GENERAL

In considering general policy, the Economic Council stated:

While the interests and views of authors, publishers and others who are closely involved with the copyright system should continue to be treated with attention and respect, it must also be recognized that technological and other developments are rapidly increasing the general public interest in

1. p 214, below.

the total information system and everything associated with it, including copyright. This general interest, embracing such matters as the desirability of maintaining ready, low-cost public access to information and minimal interference with the many complex processes by which human beings exchange ideas and other information with each other, should be adequately reflected in federal government policy-making.<sup>1</sup>

Relying on the fact that international conventions are basically non-discriminatory, the Council made a major copyright recommendation against "any substantial reductions in the basic amount or kind of protection offered to holders of Canadian copyright, but by the same token (urged) there be no substantial increases either ...<sup>2</sup>

The Council also said that

(s)ubject to two important qualifications, compensation should be in proportion to use and each user should pay his fair share. The two qualifications are "that the system must make room for the effective operation of such institutions as libraries, which like the copyright system are a vital part of the broad, publicly sanctioned information policy of society, and the system should be so designed as to be practicably enforceable".<sup>3</sup>

Speaking of the possible negative effects of any radical change, the Council emphasized the economic risks taken by authors and publishers, warning that, if copying techniques permit other persons to copy the work and make no contribution to the original costs of the author and first publisher, "the latter may not consider the game worth the candle".<sup>4</sup>

Indeed, creators and owners of copyright are opposed to the granting of any exceptions to their exclusive rights. The fact that technological progress for example, has made it easier to infringe copyright is not regarded by authors and owners as a justifiable reason for making exceptions. Authors and owners are particularly opposed to the granting of any exceptions for educational purposes, as, in their view, educational use is in no way different from any other use. They characterize exceptions as a form of subsidization by, or tax upon, a particular segment of society, namely creators.

Those who favour maintaining and extending the present exceptions are primarily educational institutions and librarians. In general, they cite the inconvenience and difficulties they would face in securing the necessary authorizations from owners of copyright.

Education claims a special status, based on its role of disseminating and utilizing present knowledge, thereby generating new knowledge. Also cited are the costs of operating the educational system, with

.. Economic Council Report, op cit, p 143.

. idem, p 114

3. ibidem, p 141

4. ibidem, p 34

particular emphasis on the limited availability of public funds. It is claimed that use of protected material is essential to the educational process. The solutions proposed range from free access and use, to a single payment for unlimited educational use including freedom to copy broadcast programs off-the-air, with appropriate regulation by the government.

Librarians similarly take a position that technology has made it possible for them to provide their traditional services in alternative ways, and with greater efficiency. Those services are already defined as including the making of single copies. Indeed, certain users contemplate complete freedom to reproduce material, provided it is done for non-commercial purposes.

It is clear that libraries engaged in supplying copies of copyright material without consent of the owners are in effect using someone else's property without paying for that property.

The sheer impact of technology is another major factor accounting for demands for further exceptions. However, technological advances that make it easier to infringe copyright should not be a rationale for legalizing or permitting what is prohibited. There is no logic, for example, in exempting from payment the use of protected works because a photocopying machine is used. Authors are also concerned over the use of recorders to record off-air for the purpose of making home collections. It has even been suggested that manufacturers of blank tapes should be taxed as a means of providing revenue to authors and composers, who are complaining of increasing encroachments on their rights, and consequential loss of revenue.

In any event, the copyright conventions circumscribe the extent to which exceptions can be made with respect to works protected by conventions, i.e. literary, dramatic, musical and artistic works. Any derogation from the minimum standards of the treaties cannot, of course, be applied to works of foreign authors; they can only apply to Canadian works. Therefore, any exceptional exceptions would only work to the detriment of nationals.<sup>1</sup> Moreover, authors faced with any large-scale derogations of rights, could assign their rights to foreign interests as a legal convenience to avoid the application of Canadian law, thus creating a climate for stifling domestic production and publishing of Canadian works.

The Economic Council's views on exceptions to copyright protection are largely dealt with in the section on "fair dealing" and "compulsory licensing".<sup>2</sup> It is sufficient at this time merely to recall that the Council emphasized that the copyright system should "make room for the effective operation of such institutions as libraries"<sup>3</sup> but did not say that the copyright law actually interfered with the effective operation of these institutions.

1. To provide exceptions to works not protected by conventions that exceed other permissible exceptions would be also to discriminate against Canadians.
2. P 147 for "fair dealing"; p 74 for "compulsory licensing".
3. Economic Council Report, op cit, p 141.

In the final analysis, those seeking increased exceptions would have to consider the possibility of higher initial purchase fees, as owners would seek to pass on to buyers the costs of having their works possibly subjected to exceptions. Owners would seek to increase the unit selling price to compensate for any reduction in total sales due to increased exceptions. If unit prices could not be increased to compensate for this reduction, then entrepreneurs might ultimately be forced to cease producing material.

It is submitted that solutions to these problems should be developed within a system which seeks to preserve authors' rights but which would permit satisfactory voluntary arrangements to be made. Generally, the problems are so difficult and complex that they should perhaps be handled only on a case to case basis.

#### B EXCEPTIONS PRESENTLY IN THE CANADIAN COPYRIGHT LAW

Sections 7, 17, 18, 19, and 50(7), provide exceptions to what would otherwise be infringing acts. Section 7 has been discussed under the heading of "Compulsory Licences"<sup>1</sup> and s 19 under "Compulsory Licences for the Mechanical Reproduction of Musical Works on Sound Recordings".<sup>2</sup>

##### 1. Fair Dealing

Section 17(2)(a) provides the legal basis for the exception of "fair dealing"; it states that "The following acts do not constitute an infringement of copyright: (a) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary".

The section is frequently cited as a basis for justifying free copying of protected materials in many places for many purposes. However, it only provides a statutory defence to a claim of infringement. What constitutes infringement is exercising or authorizing someone to exercise any of the exclusive rights given to an author under s 3(1) of the Act. Those rights are (paraphrased) in part:

1. to make a copy of the whole work, or a substantial part of the work;
2. to perform the work or any substantial part of it in public;
3. to make any translation of the work;
4. to broadcast the work.

In order to determine whether or not infringement has taken place, it is necessary for a court to first establish whether one of the rights granted by the Act has been infringed. For example, in the case of reproduction, it does not constitute infringement to copy less than a "substantial part". Only when at least a "substantial part" has been copied will infringement occur.

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1. See p 74, above.

2. See p 89, above.

It is only after a prima facie case has established that infringement has occurred that the defence of fair dealing may arise.<sup>1</sup> A leading Canadian case<sup>2</sup> decided that the quotation of a work in its entirety is not fair dealing, and that mere acknowledgement of authorship and the source from which it is obtained does not afford a defence.

By the same token, the possibility of competition between the extract or quotation and the original work will always be an element in the consideration of what amounts to fair dealing. What constitutes a "substantial part" is not determinable by quantitative or qualitative tests, but by the discretion of the court. What constitutes "fair dealing" depends upon the facts. One test is whether the taking competes with the original work: the degree of substantiality, i.e. the quantity and value of what is taken, is a factor in deciding whether or not there has been fair dealing. Only published works can be so dealt with<sup>3</sup> and solely for the purposes stipulated under the Act. Thus, fair dealing is a defence to an action, and not a broad umbrella under which it is permissible to do certain acts.

The Economic Council characterized the concept of fair dealing as being mostly concerned with "news reporting and private study",<sup>4</sup> but earlier referred to it as "the most important"<sup>5</sup> of the exemptions from copyright, and stated that the complexity of certain rules "has caused a great amount of confusion in specific cases". Reference was made to problems created by the expanded use of photocopies and tape recorders. The Council thought than an "unreasonable burden is being thrown on the consciences and amateur legal expertise of such people as librarians and copying-machine operators" and that, in terms of enforcement problems and the growth of technology, it was questionable whether the problems could be met by "simply clarifying and amplifying the fair dealing provisions, although this is certainly worth trying".<sup>6</sup> Regarding the "photo-copying problem", where it was concluded that the situation was "not primarily a problem of copyright evasion", the "possible clarification of the 'fair dealing' provisions" was in fact recommended.<sup>7</sup>

But can the scope of fair dealing be defined? This is highly doubtful, as any parameter would be, by its nature, arbitrary. Arbitrary statutory provisions may clarify but they do so at the expense of controversial decisions in many instances.

1. Johnstone v Bernard Jones Publication, Ltd., (1938) Ch. 599.
2. Zamacois v Douville et al, 3 Fox Pat. C. 44; C.P.R. 270; (1943) 2 D.L.R. 257.
3. British Oxygen Co. v Liquid Air Co., (1925) 1 Ch. 383.
4. Economic Council Report, op cit, p 133.
5. idem, p 41
6. ibidem, p 133
7. ibidem, p 160

It is submitted that the present law of fair dealing should be left unchanged, and at the discretion of the courts. On balance, providing a general statement of principles and allowing case law to develop from these principles is the most equitable approach.

At the same time, this general statement of principles can be extended to embrace new technology, for example, the summary of works by means of a broadcast or a film. Fair dealing should apply, in principle, to all material protected by any new Copyright Act.

It might be added that, if it is necessary to provide exemptions for libraries, educational institutions, and other interests, they should be provided by means of specific provisions.

#### RECOMMENDATIONS:

That "fair dealing" apply to protected material for the purposes of:

1. private study;
2. research;
3. criticism, or review - whether of that work or of another, where the criticism is accompanied by a sufficient acknowledgement of the work;
4. summary
  - a) in a newspaper, magazine or similar periodical, or
  - b) by means of a broadcast, or in a motion picture film, where such reporting is accompanied by a sufficient acknowledgement of the work.

#### 2. Use of Matrices of Artistic Works

Section 17(2)(b) of the Act provides that "where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work is not an infringement, if he does not thereby repeat or imitate the main design of that work". Thus, an artist having disposed of the copyright in a work does not infringe that copyright by using a matrix as long as he does not reproduce the main design of the earlier work.

The "main design" has been interpreted to consist of "nothing more than the particular forms and arrangements (whether of lines or colouring) which the ... author has selected as the vehicle for conveying his idea ...".<sup>1</sup>

The Ilesley Commission recommended that the Canadian law follow s 9(9) of the UK law, which reads:

The copyright in an artistic work is not infringed by the making of a subsequent artistic work by the

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1. Hansfstaengl (F) v Baines (H.R.) and Co. Ltd., (1895) A.C. 20, 27, as cited in Copinger, op cit, p 215.

same author, notwithstanding that part of the earlier work

- (a) is reproduced in the subsequent work, and
- (b) is so reproduced by the use of a (matrix) made for the purposes of the earlier work,

if in making the subsequent work the author does not repeat or imitate the main design of the earlier work.

This exception is not controversial. While it is not envisaged by the Conventions, its purpose has not been generally questioned.

*RECOMMENDATION:*

*That the exception now allowed by s 17(2) be retained, but expressed in the words of the UK Copyright Act, s 9(9).*

3. Certain Works Permanently Situated in a Public Place

Section 17(2)(c) provides that:

the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs that are not in the nature of architectural drawings or plans, of any architectural work of art"

does not constitute an infringement of copyright.

The Ilsley Report recommended<sup>1</sup> the adoption of s 9(3) of the UK law:

The copyright in a work to which this subsection applies which is permanently situated in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving, or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

This subsection applies to sculptures, and to certain works of artistic craftsmanship ...

(4) The copyright in a work of architecture is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

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1. Ilsley Report, op cit, p 70.

The provision is parallel to s 17(2) (c) of the Canadian Act but adds "inclusion of the work in a cinematographic film or in a television broadcast". The words "in premises open to the public" as opposed to "in a public place" may extend the scope of the section to premises to which the public are admitted only by licence or upon payment. It must also be noted that the UK Act, in its subsection 9(6), deals with the "publishing" of the reproduction of an artistic work permanently situated in a public place. According to that subsection, such publishing would not constitute an infringement. This is, of course, also provided for by s 17(2) (c) of the present Canadian Act.

This provision again is not envisaged by the Conventions; however many countries permit this kind of reproduction.

*RECOMMENDATION:*

*That the exception now allowed by s 17(2) (c) be maintained but expressed in the words of the UK Copyright Act, s 9(3), s 9(4), and s 9(6).*

4. Short Passages for Schools

Section 17(2) (d) provides that the following is not an infringement:

the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, or short passages from published literary works not themselves published for the use of schools in which copyright subsists, if not more than two of such passages from works by the same author are published by the same publisher within five years, and the source from which such passages are taken is acknowledged.

The subsection is fairly straightforward, although it is to be noted that only two passages in toto from all the works by the same author is permitted and not two passages from each work.

The Ilesley Commission recommended the enactment of a provision partly to the effect of section 6(6) of the UK Act which reads as follows:

6.(6) The copyright in a published literary or dramatic work is not infringed by the inclusion of a short passage therefrom in a collection intended for the use of schools, if -

- (a) the collection is described in its title, and in any advertisements thereof issued, by or on behalf of the publisher, as being so intended, and
- (b) the work in question was not published for the use of schools, and
- (c) the collection consists mainly of material in which no copyright subsists, and

- (d) the inclusion of the passage is accompanied by a sufficient acknowledgement:

Provided that this subsection shall not apply in relation to the copyright in a work, if, in addition to the passage in question two or more other excerpts from works by the author thereof (being works in which copyright subsists at the time when the collection is published) are contained in that collection, or are contained in that collection taken together with every similar collection (if any) published by the same publisher within the period of five years immediately preceding the publication of that collection.

The Commission noted that the UK section was largely to the same effect as the Canadian Act's s 17(2)(d), albeit with minor improvements. The Commission, however, questioned the usefulness of subsection 6(6)(c) of the UK Act and made the following comment:

If a publisher wishes to publish a collection of short passages, all or most of them from works in copyright, for school use - for use, for example, in studying modern literature - and is limited to two short passages from the works of any one author as set out in the proviso, what harm does the author suffer if most or all of the rest of the collection consists of short passages from works in copyright?<sup>1</sup>

Article 10 of the Rome Text of the Berne Convention more broadly permits "extracting portions from ... works for use in publications destined for educational purposes...".

*RECOMMENDATION:*

*That the exception now allowed by s 17(2)(d) be maintained; that it apply to published literary or dramatic works as set forth in s 6(6) of the UK Act, subsections (a), (b), and (d) only.*

5. Newspaper Report of Public Lecture

Section 17(2)(e) provides that the following does not constitute an infringement:

the publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except while the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph affects the provisions in paragraph (a) as to newspaper summaries;

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1. Ilsley Report, op cit, p 56.

The section does not operate, apparently, to give the lecturer any more rights than he would otherwise possess, and, as fixation is a condition for subsistence of copyright, the display of a notice would not prevent publication of an unfixed lecture. On the other hand, technology has created new ways of reporting lectures and there seems to be no reason why the exception should not extend to these new media.

The Rome Text of the Berne Convention, Art 2 (bis), permits the reproduction of lectures and addresses by the press.

**RECOMMENDATION:**

*That the exception now allowed by s 17(2)(e) be extended to include reports given by means of broadcasts and programs originated by diffusion services (cable).*

**6. Public Recitation of Extracts**

Section 17(2)(f) exempts "the reading or recitation in public by one person of any reasonable extract from any published work" from constituting an infringement. The reading would otherwise constitute a "performance in public". The Ilsley Commission recommended retention of the provision, with the addition of an acknowledgement requirement.

The UK Act also requires that such an acknowledgement be made. Further, the UK Act expressly provides that the exception is not to apply to anything done for the purpose of broadcasting. Considering that the exception can be characterized as a serious encroachment, amounting to a denial of the exclusive right of public recitation, its scope should be limited along the lines of the UK provision.

**RECOMMENDATION:**

*That the exception now allowed by s 17(2)(f) be restricted to published literary or dramatic works, properly acknowledged, but should not apply to broadcasts or diffusion by cable services.*

**7. Performance at Agricultural Fairs**

Section 17(2)(g) presently provides an exception in the case of:

the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held under federal, provincial or municipal authority, by directors thereof.

This provision received close and lengthy examination by the Ilsley Commission. In referring to a decision of the Supreme

Court of Canada<sup>1</sup> (which held that, for the exception to apply, there must be no motive of gain on the part of performers or those responsible for the fair), the Commission expressed the view that "(a)s it is in the highest degree probable that some of the music performed ... will be music in respect to which the actual performers are paid, subsection 17(2)(g) is of little practical significance".<sup>2</sup>

The Commission stated that it had received strong representations for the deletion of any exemption in favour of fairs and exhibitions. Those interests asked why composers alone were expected to contribute their property to an exhibition free of charge while performers of their works and all others are paid. The Commission itself wrote: "On the whole we can see very little ground in principle for the exemption".<sup>3</sup> On the other hand, it added:

Section 17(2)(g) should not be permitted to remain as it is now. As between amendment (so as to give it some effect) and repeal, we recommend the former in spite of our difficulty in finding a completely satisfactory principle on which to found our recommendation. We recommend that it be amended so as to apply to all agricultural and agricultural-industrial exhibitions and fairs which receive grants from the Government of Canada, a province, or a municipality, and that the exemption apply to every musical work performed at the fair except works which are performed in a place fees for admission to which are charged other than the fee payable for admission to the fair itself, and works which are performed for the purpose of advertising or attracting customers to places fees for admission to which are charged other than the fee payable for admission to the fair itself. This will have the effect of leaving musical works performed by concession holders and the like (and by the fair authorities themselves if a separate admission fee is charged) subject to performing right fees but exempting the rest.<sup>4</sup>

It is difficult to support the Ilsley recommendation as it seems at variance with logic. It is clear the Commission was unhappy with its conclusion. The exception is, in effect, a direct tax upon the composers of music for the benefit of those who use the music. There seems to be no valid reason why composers should be compelled to permit the use of their personal property free of charge.

*RECOMMENDATION:*

*That the exception now allowed by s 17(2)(g) be deleted.*

1. Composers, Authors and Publishers Association of Canada Ltd. v Western Fair Association, (1951) S.C.R. 596
2. Ilsley Report, op cit, p 60.
3. idem, p 61
4. idem, pp 61-62

8. Performance for Charitable and Other Objects

Section 17(3) provides that:

(n)o church, college or school and no religious, charitable or fraternal organizations shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

The Iilsley Commission considered this provision at length, examined certain briefs, and concluded:

We do not think a case has been made for statutory exemption. But as will be seen we are recommending that the Copyright Appeal Board be empowered, in determining the fees collectable by performing rights societies, to fix such fees as the Board may determine and we think it would be desirable for the legislation to provide that in the case of any club, society or other organization which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare, this is a circumstance which may be taken into account in determining the reasonableness of the fees to be authorized and the Board may in its discretion reduce such fees below those which it would otherwise regard as reasonable.

We are not disposed to recommend a legislative alteration of Section 17(3) ...

Section 17(3) is unsatisfactory in certain respects. It does not provide that the public performance of musical works by a religious, charitable or fraternal organization (if it is in furtherance of a religious, educational or charitable object) is not an infringement. It merely provides that no compensation is to be paid. It, therefore, leaves these organizations liable to injunction proceedings. Moreover the benefit of the exception does not extend to the performers but only to the organizations. We recommend that subsection (3) of Section 17 be replaced by a provision to the effect that the public performance of any musical work in furtherance of a religious, educational or charitable object, which is authorized by a church, college, school or religious, charitable or fraternal organization, shall not be an infringement.<sup>1</sup>

Analysis however would appear to support the deletion of the exception. This view has been held for a long time. It was even said in the 1931 Senate debates, "why should we not say that for any religious purpose ... the ladies auxiliary ... shall have the right by statute

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1. Iilsley Report, op cit, pp 63-64.

to go to the caterers and take everything required for their afternoon tea, free of charge?", or again "why should we not say that the janitor of the fraternal association ... for instance should have a statutory right to use my lawn mower to cut the grass of the associations' lawn?"<sup>1</sup>

It is submitted that, if the exception is maintained, it should be restricted to its apparent original purpose.

*RECOMMENDATION:*

*That the public performance on premises occupied by any religious, educational or charitable organization, where no person obtains a benefit in association with such a performance and where no entrance fee is charged should not constitute an infringement of copyright.*

9. Report of Political Speech in Newspaper

Section 18 also provides a further exception to infringement:

Notwithstanding anything in this Act, it shall not be infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

This section extends the right to summarize given in s 17(2)(a) and presumably includes a verbatim report.

It is noted that the Rome Text of the Berne Convention, in Art. 2 (bis) (1), leaves to domestic legislation the option to exclude political speeches from protection.

The Canadian exception appears logical and should in fact be extended to cover new media by which political speeches are now reported.

*RECOMMENDATION:*

*That the exception now allowed by s 18 be extended to include broadcasting and diffusion by cable services, in addition to newspapers.*

10. Public Performances by Gramophones and Radio Receiving Sets

In s 50(7)<sup>2</sup> of the present Act, two additional exceptions are created one of which is a major issue.

The sub-section reads as follows:

1. 1931 Senate Debates, p 2405.

2. Added in 1938.

(7) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same; in so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of this subsection.

The subsection provides exceptions from the payment of performing rights fees in respect of public performances by means of both gramophones and radio receiving sets.

(a) Gramophones

This first exception can be divided into:

- (i) an exception with respect to coin-operated gramophones, i.e. "jukeboxes", and
- (ii) an exception with respect to non-coin-operated gramophones.

(i) Jukeboxes

Section 50(7) provides for the free public performance of works by means of gramophones<sup>1</sup> in any place other than a theatre ordinarily used for entertainments to which an admission charge is made.<sup>2</sup> The subsection was held by the Privy Council, to mean that:

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1. A "gramophone" is defined, generally, as a mechanism involving a turntable upon which flat records are placed, for acoustic performance. Jukeboxes have been held to come within the definition of a gramophone. Therefore, jukebox performances of music are free of performing rights fees as are performances by way of background music piped from central locations to loudspeakers, when originated by gramophones. In Associated Broadcasting Co. et al v CAPAC, 11 Fox Pat C 116 (1951), it was held that "gramophone" meant any device in which the sound is originated from "a turntable using flat disc with sinuous grooves and pickup head". Therefore public performance by such a device has been held to be "by means of gramophone" within the ambit of the s 50(7) exclusion.
  2. The question of any performing right in records per se is not discussed here.

the exoneration of owners or users of ... gramophones from all payments in respect of public performances of musical compositions by means of those instruments ... is absolute, unqualified and unconditional, and ... that as from the date of the coming into operation of the subsection, such a public performance was a lawful act and no infringement of copyright.<sup>1</sup>

The Ilsley Commission stated that, apart from certain reservations under Article 13 of the Rome Text of the Berne Convention, "we see no reason based on what may be called copyright principles why operators of jukeboxes should be permitted to encroach on that property (the performing right) when other music users are obliged to pay".<sup>2</sup> But the Commission also suggested that other public performances by means of gramophones should not be an infringement.

Article 11 of the Rome Text gives to authors the right of public performance in accordance with "the stipulations of the present Convention" which in turn are those provided in Art. 4(2): "the extent of the protection ... shall be governed exclusively by the laws of the country where protection is claimed". Opinion is divided on the extent to which the Canadian law conforms with the Treaty requirements. Ladas interprets the Berne Convention as:

not opposed to legislation permitting ... the public execution of musical works, without the author's authorization, for instance, for charitable purposes, or special concerts not for gain. Legislation, however, which would allow such unauthorized ... performances quite generally with the effect that the author's exclusive right to authorize ... was practically denied would be against the spirit of the stipulation.<sup>3</sup>

In the US, present copyright legislation provides for an exemption for "coin-operated machines". Apparently, the exemption was enacted in 1909 as an act of what one writer terms "political expediency".<sup>4</sup> However, the new US Act, which is to come into force on January 1st, 1978, provides for a system of compulsory licensing whereby operators must obtain licences to perform the music embodied in the records used, upon payment of a flat sum for each jukebox; failure to apply for the licence or pay the ensuing royalty renders the public performance an actionable infringement. This compromise between free negotiation and total exception has been accepted by the jukebox industry.

In Canada, music publishers and the two performing rights societies are opposed to existing exceptions. No views have been recently

1. Vigneux et al v Canadian Performing Right Society, (1943) Fox Pat. C. at 193.
2. Ilsley Report, op cit, p 112.
3. Ladas, S.P.: The International Protection of Literary and Artistic Property, 2 vols., MacMillan, New York, 1938; p 399.
4. E. Monney, The Jukebox Exemption, ASCAP Copyright Law Symposium, No. 10 (1959) p 199.

expressed by the jukebox industry or jukebox operators to the Department. The Ilsley Commission, however, reported their views as follows:

The main grounds on which the operators through their association defend the exemption are (i) that their use of records in this way popularizes the musical works recorded and greatly stimulates the sale of records and sheet music, thereby greatly increasing the returns which the authors and composers receive in royalties for mechanical rights and royalties on the sheet music sold; and (ii) that nearly all the works recorded and played are those of American authors and composers who are members of ASCAP or BMI-US; that these authors and composers are not entitled to collect in respect of jukebox playing in the United States and that it is unfair that they should be permitted through CAPAC and BMI to collect in Canada.<sup>1</sup>

The Commission rightly rejected the first ground on which the jukebox industry defended the exemption, by stating that similar grounds could also support the denial of a broadcasting right. The Commission was more sympathetic to the second ground raised, but, having noted that "not all of the money collected for the playing of jukebox records would go to residents of the United States",<sup>2</sup> concluded that the problem was more in the nature of a political issue and suggested that Canada might prefer to let the US be the first to delete the exemption. The Commission's point, of course, is now met, the US having adopted a new copyright law incorporating the new jukebox provisions.

Whether the result of good intentions, bad drafting, judicial interpretation,<sup>3</sup> or technological development, s 50(7) has created a situation which is inequitable and illogical. It is inequitable because an exception originally designed to lessen the burden on small businesses (for use of gramophones) has become a means of supporting an industry at the expense of composers' rights. It is illogical because the exception applies only to music, and then only to music on records capable of reproduction by gramophones and not music recorded on tape, wire, or film. For these reasons alone, s 50(7) should be deleted.

#### (ii) Non-coin operated gramophones

The foregoing discussion has been related mainly to coin-operated gramophones. However, there is no logical distinction between

.. Ilsley Report, op cit, p 112.

2. idem

3. In 1946, an Australian judge, in a case almost identical to Vigneux v CPRS (see p 158, above), was able to arrive at a finding opposite to the Privy Council's dictum in Vigneux, "without too strongly showing his disapproval of it"; see Winstone v Wurlitzer Automatic Phonograph Company of Australia Proprietary Limited, (1946) V.L.R. 338.

machines requiring coin operation and those gramophones operated by businesses providing either background or foreground music, e.g. discotheques, for commercial benefit. It is the latter which are of increasing importance.

Indeed, the probable demise of the jukebox has been recognized in the press: "urban renewal, fast food restaurants, television and portable tape recorders have sounded the death knell for ... the ... jukebox".<sup>1</sup> For example, no less than the Wurlitzer Company was reported as going out of business in the face of a declining market, after having made over 750,000 jukeboxes since 1934.

On the other hand, the growing use of machines to provide the basic product of discotheques has created a fast-growing industry whose use of music must be taken into account. Indeed, the Ilesley Commission recommended that "contrivances which are likely to compete in a substantial and important way with fee-paying systems such as wired music systems should not be exempt from licence fees".<sup>2</sup> It is submitted that this principle is correct. It is further submitted that the right to perform in public should not depend on the means by which the performance is given.

*RECOMMENDATION:*

*That the exception now allowed by s 50(7) be deleted.*

(b) Radio Receiving Sets

It is recalled that the Privy Council held that the exception provided by s 50(7) relating to gramophones and receiving sets was "absolute, unqualified and unconditional".<sup>3</sup>

But, s 50(7) also provides that "the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection".

At one time, the Copyright Appeal Board approved a nominal tariff of \$1,000 per year payable by broadcasters in respect of public performances by radio receiving sets.<sup>4</sup> The Ilesley Commission noted with approval that the tariff had been discontinued. Indeed, its recommendation was to retain the exception, such "the broadcast may at the moment it is broadcast, freely and without infringement to anyone's copyright be caused to be seen or heard in public at the receiving end and with or without profit".

1. Ottawa Journal, March 7, 1974, p 16.
2. Ilesley Report, op cit, p 113.
3. Vigneux et al v Canadian Performing Right Society, 4, Fox Pat. C.
4. No tariff was ever approved requiring gramophone manufacturers to pay public performance fees.
5. Ilesley Report, op cit, p 29.

In the words of Fox:

The idea prompting the enactment of s 50(7) was obviously to obviate the collection of any fees or royalties from the users of ... radio receiving sets, by which means were performed musical works that were the subject of copyright in the cases where the users were in a small and rather inconsequential way (sic) and where any direct or incidental profit from such users was small, if any at all.<sup>1</sup>

The IIsley Commission mentions that the derogation is in conformity with Article 13 of the Rome Text of the Berne Convention, as any member state may post reservations on the exclusive right of the author to authorize the public performance of a musical work by means of mechanical contrivances.<sup>2</sup> However, that Article speaks only to the performance of musical works by means of mechanical contrivances, while the exception of the Canadian Copyright Act is also directed at public performances by means of radio receiving sets.

By depriving the author of any remuneration when, at the place of program reception, the work is being performed by means of a radio receiving set, the exception unquestionably runs counter to the Berne Convention's principle.

On the other hand, it is manifest that small business proprietors should be exempt from the payment of performing rights fees when they have radio receiving sets playing in their establishments for their personal pleasure. The fact that a "public" performance is being carried out at the same time is purely fortuitous. The problem then becomes one of determining the limit of the exception. A line must be drawn between the use of a receiving set for personal pleasure (or where a public performance arises fortuitously, concurrent with private pleasure) and a commercial use in public of that receiver. Where more than three persons are employed, it can probably be said that the commercial aspect permeates the enterprise and radio reception is no longer "innocent". Making the number of employees a criterion for exemption is probably the least litigious, most easily applicable solution.<sup>3</sup>

#### RECOMMENDATION:

*That the public performance of copyright material by broadcast receivers or similar devices in an enterprise not employing more than three persons be exempt from payment of performing rights fees.*

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- Fox op cit, pp 531-532.
  - IIsley Report, op cit, p 113.
  - This criteria has been used, for example, in several Acts in Quebec and Ontario.

## C OTHER EXCEPTIONS CONSIDERED

Exceptions to copyright protection now existing in present Canadian legislation have been considered and dealt with, but there have been requests for other exceptions made from time to time by various interest groups. These will now be reviewed.

### 1. Photocopying

Section 3(1) of the present Act provides that copyright includes "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever". Section 17(1) provides that copyright is infringed "by any person who without the consent of the owner of the copyright does anything that by this Act only the owner of the copyright has the right to do". Section 2 defines "infringing" with reference to copies as meaning "any copy, including any colourable imitation made or imported in contravention" of the Act. Photocopies, prima facie, fall within this definition of infringement.

The user's difficulty in gaining access to information has enormously decreased through technological progress, while the creator's difficulties in controlling unauthorized reproduction has correspondingly increased. Copying machines, which include the so-called photocopier, microfilm, and microfiche have radically improved the speed and ease with which copyright material can be made available to the consumer. The question is one of how to strike an equitable balance between the interests of users and owners?

In attempting to answer this question, the Economic Council dismissed the ideas of licensing, or machines with stamps or metering devices, to determine copyright royalties as negative, defensive and partial, because they would thrust the initiative and costs of development on the consumer, and would be unenforceable. The Council preferred a more "positive" solution involving the development of an intermediate independent organization which would provide fast and convenient delivery of non-infringing copies and other short-run materials;<sup>1</sup> it was nevertheless unsure of the economic and political feasibility of such a facility.

While the Council stressed that ready, low-cost public access to information is desirable,<sup>2</sup> it also suggested that there should be no basic change in copyright protection.<sup>3</sup> Regarding compensation, the Council said it should be in proportion to use and each user should pay his fair share, with two qualifications:

that the system must make room for the effective operation of such institutions as libraries, which like the copyright system are a vital part of the broad, publicly sanctioned information policy of

1. The Council did not appear to consider that publishers may be restricted, by contract with authors, from publishing paperback editions, or making photocopies, or distributing the work other than in book form.
2. Economic Council Report, op cit, p 143.
3. idem, p 146

society, and that the system should be so designed as to be practicably enforceable, without excessively costly and oppressive policing, and without unreasonable intrusion into private homes and other sectors of a small-scale information-processing and exchange.<sup>1</sup>

The Council saw some advantage in providing

for private organizations which would accept assignments of a creator's rights, as is now done for musical composers with their performing rights societies. These organizations would act as agents for the copyright owners, and licences could be more expeditiously acquired and appropriate royalties paid to the copyright owners.<sup>2</sup>

As a result, it recommended that the Copyright Act be amended to permit wider use of the performing rights societies approach, but cautioned that such collectives would have to be controlled carefully in order to protect the public.<sup>3</sup>

By the same token, the Council warned that state censorship and private monopoly must be avoided by any solutions, indicating that compulsory reproduction of works should not be allowed as this could create discrimination in setting rewards.

Finally, the Council found the problems so complex and in such a state of flux that it recommended that solutions be sought through further study.

In views expressed to the Department, authors and copyright owners were of the opinion that there was insufficient policing by the government, insufficient penalties in the Act and too liberal an interpretation of "fair dealing". They saw a need for the Copyright Act to clearly prohibit unauthorized use of copyright materials, in particular by photocopying, and for more meaningful penalties for infringers, e.g. substantial increases in damages and fines for subsequent offences.

It would be interesting to study the extent of photocopying carried on by private enterprises to determine the amount of infringement taking place other than in libraries and schools. However, such a study would only serve to quantify the extent of the practice, which, by any standard, is enormous. It is obvious that photocopying machines are continually reproducing specific forms of expression in the same way a printing press could.

A recent case in Australia<sup>4</sup> is indicative of the increasing militancy of copyright owners. It was held on appeal and cross-appeal that the University of New South Wales had authorized an infringement by a

1. Economic Council Report, op cit, p 141.

2. ibidem, pp 147-148

3. ibidem, p 151

4. Moorhouse and Angus & Robertson, Publishers, Pty Ltd. v University of New South Wales; (1974) 3 ALR, p 1.

student, who used coin-operated photocopying machine in the University library to make two copies of ten pages of a book. (Under the Australian Copyright Act, as in Canada, it is an infringement to authorize, unlawfully, another person to do an act that amounts to an infringement). Cases in other jurisdictions have reached a variety of conclusions, notably in the USA.<sup>1</sup>

Photocopying is an international as well as a domestic problem. A number of international meetings have been held to identify the problems and make recommendations for possible solutions. Initial solutions envisaged a treaty or an agreement to subscribe to certain general criteria. However, no agreement has been reached on the need for an international instrument.

A great deal has been said about photocopying, both in relation to and apart from, fair dealing. The concept and doctrine of fair dealing was, initially, an adequate safety valve for the needs of society in relation to uses made of copyright works. That doctrine had its roots in the print technology era and, while it might be possible to enlarge the scope of the doctrine to bring within its ambit the use made of material by the communications media, the doctrine should not necessarily be enlarged to provide additional exceptions to copyright protection, other than those presently coming within the scope of fair dealing. The Economic Council itself expressed doubts on whether a simple clarification and amplification of the fair dealing provision would be sufficient to meet the problems created by new technology.<sup>2</sup> If it were considered necessary to make photocopying an exception, then it should be stated expressly.

On the other hand, the primary purpose of the copyright law is to enumerate and protect the rights of creators and not to act as a mechanism for the protection of special interests, unless society considers that the special interests should be provided with the exceptions sought. The Economic Council is correct in saying that the labourer is worthy of his hire, that compensation should be in proportion to use, and that each user should pay his fair share. This compensation, it is submitted, should be negotiable between the author or copyright holder and the user. The search should not be abandoned, however, for a more equitable solution to better serve the needs of both creators and users. If such a solution is found, it should reflect the principle that the creator's reward should be commensurate with the use made of his material.

It may very well be that the answer to part of the problem, particularly that of acquiring permission to copy, may lie in the collective assertion of copyright rights. During the consultation process, copyright owners generally agreed with the view that the answer lay in the use of collectives rather than having individual owners pursue their own remedies, (thus avoiding the embarrassment of owners suing their best customers, e.g. libraries) or having the federal government engage in protecting individuals whose private rights are being invaded.

1. See Williams and Wilkins Company v the United States 1972 USPQ 670.

2. Economic Council Report, op cit, p 133.

Canadian law presently makes it possible to form organizations of owners of rights to collectively authorize users to do certain things, for instance, to photocopy. There are already two organizations licensing the performance in public and the broadcasting of copyright music. Such collectives permit the orderly and regular utilization of works by users on an equitable basis. Extended to other types of rights, such as the right to photocopy, such mechanisms could help relieve the frustration of users who complain that they are unable to acquire authority to use a work needed immediately.

It appears that the collective exercise of copyrights could clear up many of the photocopy infringement problems, as well as the problem of enforcement.<sup>1</sup> Using the simple process of assignment of contract, the collective would be able to enforce copyrights without involving the holder of the copyright. A collective mechanism could handle the copyright owner's interests without a direct agreement between the producer and the user. Obtaining evidence for law suits could be the responsibility of this collective which would have the special legal knowledge and the resources required for such problems. With government regulation by means of a tribunal, discriminatory results could be avoided in the licensing rates and arrangements. The onus would then fall, as it does now, on publishers and authors to enforce and to look after their own interests. The government should not be asked to step in and stop infringers.

The present copyright law is fundamentally clear. Remedies exist and it is up to owners to enforce their rights. The best that the government can do is to suggest to the publishers and authors a means of more clearly asserting these rights; to make it possible to create and operate collectives; to publicize the laws; and to clarify to some degree the more contentious points of law, particularly those concerning libraries and educational institutions.

It is submitted that no exception for photocopying should be provided in the Act. Rather it is emphasized that copyright law confers private rights which should be pursued by those who possess the rights.

**RECOMMENDATIONS:**

1. That photocopying not be the subject of any specific provisions.
  2. That any new Copyright Act allow, as it does presently, and encourage the formation of collectives to protect authors' and publishers' interests, under the supervision of a government tribunal.
- 
1. Steps have been taken to form such collectives, a recent example being the incorporation of the Organization of Canadian Authors and Publishers (OCAP) Ltd. (1973): to acquire and collect copyright royalties, on behalf of itself or others, and to licence others to reproduce copyright material. It is understood that the Organization is presently engaged in negotiation. A similar organization La Société Canadienne-française pour la Protection des Droits d'Auteurs, has existed for some time in Quebec.

## 2. Exceptions Applicable to Libraries

Under the present law, it is doubtful whether the defence of fair dealing is available to librarians who make copies of material for third parties who themselves could claim that defence, e.g. library users engaged in research. The UK Act, s 7, recognizes that such action by librarians comes within the ambit of fair dealing. This appears to be a reasonable solution.

It has also been recommended to the Department that it should be possible:

- (i) for a library to make one copy of a particular work for another library;
- (ii) to make a copying permissible where a group of libraries relies on one member of the group to purchase and then supply copies, by means of photocopying, to the other members of that group.

The implications of these recommendations are apparent. It has already been recommended in previous sections of this Part I that the doctrine of fair dealing not be enlarged.

*RECOMMENDATIONS:*

1. *That the defence of fair dealing be available to a librarian who makes a copy of material for a user if that user also has available to him the defence of fair dealing.*
2. *That no further exceptions for libraries be provided.<sup>2</sup>*

## 3. Exceptions Applicable to Judicial Proceedings

The Ilsley Commission recommended adopting an exception for works reproduced for the purposes of judicial proceedings or in official reports of such proceedings. Such a recommendation is certainly reasonable. It seems, however, that an exception for reproduction alone would not fully protect these users, as certain works (e.g. audiovisual material) might indeed be used without being "reproduced".

*RECOMMENDATION:*

*That any use of protected subject matter for the purposes of judicial proceedings or in official reports of such proceedings not constitute an infringement.*

1. See Fair Dealing, p 147, above.

2. Except as in a recommendation made regarding importation, see p 203, and in respect of certain archival functions, p 175, below.

#### 4. Exceptions Applicable to Ephemeral Recordings

The current Canadian law does not provide for the possibility of making "ephemeral" (temporary) recordings. The broadcasting practice of making ephemeral recordings of material for broadcast, in order to facilitate programming, should be reflected in the law as a permitted exception to the rights of copyright owners.

There are no specific provisions in the Rome Text of the Berne Convention for such an exception. In fact, Article 11 (bis) left to authors the exclusive right to communicate their works by broadcasting. However, paragraph 3 provides that member countries may regulate the conditions under which the right is to be exercised, where the situation is strictly domestic, and without prejudice to moral rights or the right to obtain equitable remuneration. The Brussels Text (1948) directly adverts to "ephemeral recordings", in Article 11 (bis) (3), where it is left to member countries "to determine the regulations for ephemeral recordings made by a broadcasting body by means of its own facilities and used for its own emissions", and to authorize official archival storage of such recordings. This provision has been maintained in succeeding Texts.

The Ilsley Commission made specific recommendations, based upon certain considerations, as follows:

... such recordings, provided they are used purely to facilitate the broadcasting of copyright material, are merely tools in the hand of the broadcaster which assist him to do what the author or his assignee authorized him to do.

...

Accordingly we recommend that authorization to broadcast a copyright work should be deemed to include the right to make ephemeral recordings of the work solely for the purposes of broadcasting, or, in the alternative, that such recordings are not infringements.

A recording should be deemed to be an ephemeral recording if it or copies of it are used solely for the purpose of the authorized broadcasting within a period of thirty days after the day when it or a copy of it was first broadcast and if thereafter it or they are used for no purpose other than research or study.<sup>1</sup>

Under s 6(7) of the UK Act, where authorization is given to broadcast, there is an implied right to make an ephemeral recording (to be destroyed 25 days from the time of first broadcast).

Under the newly adopted US law, where a transmitting organization is entitled to transmit a performance or display, (except films or other audiovisual works,) it may also make one ephemeral recording for its own local use which must be destroyed within six months from the date of first transmission or kept soley for archival purposes.

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1. Ilsley Report, op cit, p 57.

During the consultation process, the view was expressed by certain composers that they considered the provision of such a right acceptable if a recording is made for broadcast purposes, but no right should be provided which contradicts the moral rights of composers. They gave as an example the mutilation of music by commercial radio stations which trim musical works (fade-ins, fade-outs, cuts) according to program schedules or in order to introduce commercial advertisements.

On balance, it would appear that an exception for ephemeral recordings is desirable, as it would provide a legal basis for current practice.

*RECOMMENDATION:*

*That an exception for "ephemeral recordings" be provided, in accordance with the following:*

- a) Authorization to broadcast a copyright work should be deemed to include the right to make ephemeral recordings of the work solely for the purposes of broadcasting.
- b) A recording should be deemed an ephemeral recording if it or copies of it are used solely for the purpose of the authorized broadcasting within a period of 30 days after the day when it or a copy of it was first broadcast.

5. Exceptions Applicable to Artistic Works

(a) Incidental use in a broadcast

It may be considered desirable, as in other jurisdictions, to provide further specific exceptions to take into account certain artistic or architectural works. For example s 9(5) of the UK Act provides:

... the copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film or in a television broadcast, if its inclusion therein is only by way of background or is otherwise only incidental to the principal matters represented in the film or broadcast.

This exception is provided to permit incidental use which would otherwise constitute infringement. The recommendation made in this Paper with respect to rights in artistic works<sup>1</sup> envisages the provision of a right to broadcast an artistic work. It would therefore be an infringement to include a protected artistic work in a broadcast, no matter how accidental that inclusion might be. Such a result does not appear to be desirable. Rather, it would seem reasonable to adopt in any new Copyright Act a provision similar to the one quoted above.

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1. See p 53, above.

*RECOMMENDATIONS:*

1. That incidental use of an artistic work in a film or broadcast not constitute an infringement of copyright.
2. That the term "broadcast" in this and related provisions include an origination (diffusion) by a cable system.

## (b) Making of three dimensional objects

The UK Act provides, in s 9(8):

The making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work.

The purpose of the provision is to dispel any notion under the 1911 Act that copyright in a two-dimensional work could be infringed by the making of a three-dimensional one. The exception stipulates that it is necessary that the thing reproduced should not itself resemble the original to non-experts. The necessity for the exception arises because one of the author's exclusive rights is reproduction in any material form, and 'reproduction' is defined as including conversion from two to three dimensions, or vice-versa.<sup>1</sup> The same need for clarification arises in the Canadian Act. It seems that the UK solution would be an equitable one to adopt.

*RECOMMENDATION:*

*That the making of a three-dimensional object of a two-dimensional artistic work not constitute infringement if the object made is not a reproduction of the original work.*

## (c) Reconstruction of buildings

Section 9(10) of the UK Act also provides:

Where copyright subsists in a building as a work of architecture, the copyright is not infringed by any reconstruction of that building; and where a building has been constructed in accordance with architectural drawings or plans in which copyright subsists, and has been so constructed by, or with the licence of, the owner of that copyright, any subsequent reconstruction of the building by reference to those drawings or plans

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1. UK Copyright Act s 48(1).

shall not constitute an infringement of that copyright.

By reason of a preceding provision, s 9(9), it would be permissible for an architect to make a subsequent work which reproduced part of an earlier work, even if he had parted with the copyright in that earlier work. The section is equivalent to s 17(2)(b) in the Canadian Act, which deals with repeating the main design of a work. It appears that the scope of the UK provision might be larger than necessary; it is thus proposed that the principle therein be recognized according to the following recommendation.

*RECOMMENDATION:*

*That the reconstruction of a partially or completely destroyed building not constitute an infringement of the copyright in the building, nor an infringement of the copyright in the plans and drawings of the building.*

6. Exceptions Available to the Handicapped

The idea of exceptions for the handicapped was conceived within the context of library services reproducing works in special media (e.g. braille, enlarged prints). There are no provisions granting such exceptions in the present Act.

In views expressed to the Department, it was suggested that it would be in the public interest to provide an exception for copying done to serve the handicapped, provided that such service were non-profit. It was recommended that the law provide that a work is not infringed if it is transcribed into a medium that makes it accessible to those who have been certified as unable to make use of conventional media; provided that such transcription is done by, or on behalf of, a library or other non-profit agency solely for the use of the handicapped. It was also recommended that the transcriptions not constitute "public performance" or "publication" within the meaning of the Copyright Act.

It is obvious that, whether or not such services are established for profit, the author whose work is being used in this manner would not derive any revenue from such use. Even if the reproduction materials were provided at cost, the fact remains that others would derive at least some payment from participation in the services, e.g. those who transcribe writing to braille. According to the views expressed, it seemed that only the author would receive no remuneration.

Two arguments are offered to counter the above statement:

- (a) Handicapped readers unable to use conventional printed material would not purchase published materials in their original print form, so no revenue would be forfeited due to the exception.

If extended to its logical conclusion, such an argument would dictate that an author who first publishes in braille would forfeit his copyright for the same work printed in conventional form, as he could not have expected to reach the "normal" reading public at the outset. Extended to other categories of works, one would infer that a composer's market is not disrupted when his recorded work is printed on sheet music, as most people who buy the record would not buy the written score.

The error in this argument comes from limiting the notion of "market" to traditional sectors. For a copyright owner, the market represents all possible exploitations of the work. In that sense, the adaptation of a work into special media is merely a new area of exploitation.

- (b) Prior to transcription, transcribing agencies would normally obtain through commercial channels one or more print copies of each publication to be transcribed into a special medium.

However, the buying of one copy of a work is not authority to make an adaptation; it has never been recognized that purchase of a copy is purchase of the copyright. Moreover, it is sufficiently evident that the buying of a few copies for the purpose of "transcription", although it admittedly adds to the original market, in no way compensates for the new market that the transcription serves to open up.

Few foreign jurisdiction have legislation dealing specifically with the problem of the handicapped. Most countries, however, provide general exceptions for schools and it could be said that part of the problem of the handicapped is met by such exceptions.

Among the countries which provide specific exceptions for the benefit of handicapped is the US: by s 110(8) of its new law, effective January 1, 1978, it is not an infringement to perform a nondramatic literary work under certain circumstances for the benefit of handicapped persons unable to read or hear.

The Scandinavian countries also provide specific exceptions. It should be noted, as an example of how the exceptions can be extended, that Denmark and Norway also provide exceptions for the deaf or persons suffering from speech impediments. Sweden extends the exception to "other seriously disabled persons". It is noteworthy that these countries either limit the possible "transcriptions" to braille only, or specify that the author is to receive adequate compensation for the reproductions of his work in special media. Norway even provides that the compensation "shall be defrayed by the State". Indeed, it is only logical that a social need be the responsibility of a whole society rather than that of a small segment of that society.

Although the need for a special service to the handicapped may be readily recognized, it has not been established that this need would be most adequately met by penalizing the author or copyright owner by a broad exception from copyright in favour of special media producers and users.

#### RECOMMENDATION:

*That no special exception be provided for the benefit of producers of special media material for the handicapped.*

#### 7. Exceptions Applicable to Education

Certain educators are not opposed to making payments to authors and owners for educational uses of their works, provided it is

through a mechanism whereby it would be easy to obtain licences without making individual arrangements and payments. The exception would apply only to teaching use within the confines of the institution and by none other than teachers and students; for example, the screening of audiovisual works by parents would not come within the provision. Other educators however asked for provisions which would secure access to materials generally, on a free basis.

Another situation was envisaged where recompense for the use, by Canadian schools, of material copied off-air would be paid to the copyright owner by the broadcaster who broadcasts the particular program. The problem is that broadcasters do not now, and probably would not in future, make additional payments to cover the possible copying of their broadcasts. Broadcasters would never be in a position to ask sponsors of programs to pay more in the light of the possibility that programs might be copied off-air. In any event, broadcasters are not usually the owners of the copyright in broadcast material.

The UK Act provides for certain specific exceptions for educational institutions in addition to the defence of fair dealing. Section 41 of the UK Act reads:

- (1) Where copyright subsists in a literary, dramatic, musical or artistic work, the copyright shall not be taken to be infringed by reason only that the work is reproduced, or an adaptation of the work is made or reproduced,
  - (a) in the course of instruction, whether at a school or elsewhere, where the reproduction or adaptation is made by a teacher or pupil otherwise than by the use of a duplicating process, or
  - (b) as part of the questions to be answered in an examination, or in an answer to such a question.
- (2) Nothing in the preceding subsection shall apply to the publication of a work or of an adaptation of a work.

It is important to note that, under this section, the only reproduction exempted from being an infringement is that which is made "otherwise than by the use of a duplicating process". The usefulness of the exception is therefore minimal. Considering the recommendations made in this Paper with respect to fair dealing and photocopying, it is not proposed that the above UK provision be adopted.

On the other hand, s 41(3) of the UK Act provides an exception to the exclusive performing right of the author, which appears sound and equitable. The section reads as follows:

- 41.(3) For the avoidance of doubt it is hereby declared that, where a literary, dramatic or musical work
- (a) is performed in class, or otherwise in the presence of an audience, and
  - (b) is so performed in the course of the activities of a school, by a person who is a teacher in, or a pupil in attendance at, the school,

the performance shall not be taken for the purposes of this Act to be a performance in public if the audience is limited to persons who are teachers in, or pupils in attendance at, the school, or are otherwise directly connected with the activities of the school.

Under these provisions, literary, dramatic, and musical works may be performed in the course of activities of a school without constituting a performance in public, and thus without infringing copyright. The Act further provides that this exception shall apply equally to records, films and television broadcasts.

*RECOMMENDATION:*

*That it be permissible to perform material protected by copyright in the course of activities in a school, without such a performance constituting a performance in public, providing any audience is limited to teachers at or pupils in attendance at that school.*

#### 8. Exceptions Applicable to Archival Activities

Another question arises with respect to whether exceptions should be provided for certain preservation and archival activities. In the Canadian law, no statutory exceptions are provided other than the defence of fair dealing for the purposes of, *inter alia*, private study, research, and criticism.

With respect to unpublished works, exceptions are sought to provide that, where documents are deposited in archives, it would be permissible for the archives to make copies for the purpose of preservation, but that no presumption in the Act operates to overcome any contractual arrangements.

Reference was made to the long-range preservation of recorded thought and to the copyright problems relating to thousands of unpublished letters and papers, many of which are subject to restrictions, which causes difficulties for researchers.

The problem is social. Copyright deals with the rights of authors first and not with the cultural objectives of society as manifested in any policy concerning the preservation and archival storage of copyright works. The existence of such a policy presupposes certain value standards which are inherently subjective in nature, such as "scholarly value" in terms of the choice of works to be preserved. Such a subjective criterion is impossible to incorporate into a Copyright Act.

Provisions in the copyright laws of the USA and the UK do not extend blanket exceptions to libraries and archives, but rather they strictly limit the type and kinds of permissible activities and then only in relation to certain kinds of works.

Section 7(6) of the UK Act provides that, where the manuscript or a copy of an unpublished work is kept in a library, museum or other institution which is open to public inspection, and more than 50 years has elapsed from the end of the calendar year in which the author died, and more than 100 years has elapsed from the end of the making of the work, then the work may be reproduced for purposes of research or private study, or with a view to publication.

The new USA law, effective January 1, 1978, provides limitations on exclusive rights for the benefit of libraries and archives which apply to a copy or phonorecord of an unpublished work made solely for purposes of preservation and security or for deposit for research use in another library or archives; or solely for the purpose of replacing a copy of a phonorecord that is damaged, deteriorating, lost or stolen. In general, the exceptions do not apply to a musical work, a pictorial, graphic work or sculptural work, nor to a motion picture film.

It is to be noted that neither law provides for exceptions other than reproduction by libraries and archives of certain works already on deposit.

The basic question is thus: to what extent can works lawfully required be dealt with? Since so much depends initially upon any contractual arrangement, such contractual arrangements would seem to be the more preferable course to that of any statutory provision. While the manner in which archives can use these works is determined both by the copyright law and by any contractual arrangement made with the copyright owner, it is submitted that libraries and institutions should be relying primarily on contract rather than statutory exceptions.

The problems surrounding archives seem to centre upon the status of unpublished works; the apparent general aim is to equate unpublished and published works. However, the Ilsley Report states: "The right of an author to prevent publication of a work of his is an important and fundamental one".<sup>1</sup> As a corollary, unpublished works should not be subject to the exceptions applicable to published works, e.g. fair dealing. It might be added that it is not possible to broaden the definition of "publication" to provide easier access to unpublished works, and still remain within the bounds of the Conventions, insofar as non-nationals are concerned. This view is supported by the Ilsley Report.

It would appear that length of term is the major issue. There were strong views expressed that there should be a fixed term of protection in all instances, including where a work remains unpublished. This Paper makes such a recommendation.<sup>2</sup> On the other hand, the principle of authors having reserved to them alone the right to publish or not has been stressed as fundamental to copyright law. It has also been urged that the basic principle of privacy and confidence, should be maintained to protect works which have not been made available to the public, in accordance with the doctrine of moral rights.

With respect to unpublished letters and manuscripts held by libraries the view has been expressed that copyright should not be perpetual and that exhibition should equate publication. It was recommended that once permission to exhibit has been given, publication should be deemed to occur when the exhibition is made.

Given the recognition of basic right to choose to disclose and the need to maintain the principle of privacy and confidence, no obligation or pressure to publish should be created. It would therefore be difficult to reconcile these views with the view that storage in a computer or in libraries of unpublished theses for example should constitute publication.

1. Ilsley Report, op cit, p 33.

2. See Term of Protection, p 65, above.

**RECOMMENDATION:**

*That no statutory exceptions be provided to libraries and archives with respect to copyright material deposited therein, other than to permit the making of a copy for the sole purpose of preserving the material which is deteriorating or damaged.*

#### 9. Exceptions Applicable to Non-exclusive Licences in Certain Cases

In general, the exclusive rights granted by the Copyright Act are to be exercised by the copyright owner alone. However, in certain cases, following the death of the author, a situation may arise where it is not possible to locate the owner, the successors in title, or the assignee(s) of the owner of the copyright.

In such an instance, and where someone wishes to use the work in a way which would otherwise constitute an infringement of copyright, it should be provided that such use not constitute an infringement of copyright, providing certain conditions are met.

The exception could be allowed in the form of a non-exclusive licence to use the work following an appropriate application to the Copyright Tribunal<sup>1</sup> which would exercise a discretionary power to grant the licence; the Tribunal could establish whatever criteria it deemed appropriate for making a determination. Among other criteria, it should be necessary to satisfy the Tribunal that the applicant has done everything necessary in order to locate the owner of the copyright in question. Presumably, the Tribunal would require the applicant to have made an adequate search, or taken steps to publicize his request, and to do whatever the Tribunal considers necessary to be done in the particular case.

If an applicant has met the criteria established by the Tribunal, he could be issued a licence on such terms and conditions, including the payment of appropriate royalties, as the Tribunal should stipulate.

It is submitted that, as the contemplated exception applies only to a situation where the author has died and where it is not possible to locate the owner of the copyright, the exception should apply only to those works where calculation of the term of protection is based on the life of the author. Moreover, such an exception should apply to permit use of the work only to the extent which has been permitted during the author's lifetime.

**RECOMMENDATIONS:**

1. That a non-exclusive licence to use a work be obtainable upon application to the Copyright Tribunal and granted on such terms and conditions as the Tribunal may determine providing:
    - a) the author of the work has died;
    - b) the applicant wishes to use the work as it had previously been used with the author's consent, and has not been able to locate the owner of the copyright in the work;
- 
1. See The Copyright Tribunal, p 214, below.

- c) the applicant has complied with the criteria established by the Tribunal for determining the adequacy of the applicant's search for the owner;
  - d) the applicant has complied with all terms and conditions imposed by the Tribunal; and
  - e) appropriate arrangements have been made for the payment of royalties should the copyright owner be located.
2. That the granting of such a licence not constitute infringement of the copyright in the work.
  3. That the Copyright Tribunal have the sole discretionary power to issue such a licence.
  4. That the exception not affect or modify any other compulsory licensing provision.

## V INFRINGEMENT

The Copyright Act provides remedies for the infringement of rights granted under the statute. Infringement can generally be broken down into two types: direct and indirect.

### A DIRECT INFRINGEMENT

Direct infringement consists of the unauthorized exercise of any of the exclusive rights of the copyright owner.

Section 17(1) of the Copyright Act provides:

Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.

Direct infringement is actionable at the suit of the owner. "Innocence",<sup>1</sup> that is lack of knowledge of the subsistence of copyright, is not a valid defence to such an action.

### B INDIRECT INFRINGEMENT

The provisions concerning indirect infringement relate to persons who deal in and with infringing copies, or unlawfully permit in certain circumstances a public performance of a work. The relevant subsections are found in Section 17:

- (4) Copyright in a work shall also be deemed to be infringed by any person who
  - (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire;
  - (b) distributes either for the purposes of trade, or to such an extent as to effect prejudicially the owner of the copyright;

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1. The question of "innocence" is discussed under Presumptions - the Innocent infringer, p 178, below.

- (c) by way of trade exhibits in public; or
- (d) imports for sale or hire into Canada;

any work that to his knowledge infringes copyright or would infringe copyright if it has been made within Canada.

- (5) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Both sections 17(4) and 17(5) require proof of knowledge on the part of the defendant that he has infringed copyright. In the case of indirect infringement, then, "innocence" may be a valid defence.

Considering the recommendation made in this Paper that any new Act distinguish between "traditional works" and "material not protected by international copyright conventions", it would appear necessary to change the word "work" in s 17(4) to a word or phrase which would indicate that the section applies to all protected subject matter.<sup>1</sup>

With respect to s 17(5), it would seem that if anyone should have reasonable grounds for being aware of the possibility of copyright being infringed, it is the proprietor of the premises who makes them available for rental. Furthermore, the existing and continuing practice of both performing right societies is to grant licences directly to the proprietor of the premises used for the public performance of musical works. In turn, the proprietor of the premises can recover the cost of such licences through rental fees. Such is no doubt a reasonable business practice, and one which makes it easier for both users and creators of protected material. The practice should therefore be recognized more specifically in any new Copyright Act by making the proprietor of premises used for the public performance of protected material fully responsible for the payment of licence fees for such performances.

#### RECOMMENDATIONS:

1. That the terms of present s 17(4) be retained but also include indirect infringement with respect to all protected subject matter.
  2. That the terms of present s 17(5) be retained but without the words "unless he was not aware and had no reasonable ground for suspecting, that the performance would be an infringement of copyright".
- 
1. Other changes to s 17(4) are suggested under Importation Provisions, p 195, below.

## VI REMEDIES

The present Copyright Act provides summary as well as civil remedies. Summary remedies are expressed as "offences", entailing fines, imprisonment sentences, and even, in certain instances, hard labour. They are pursued by the Crown, at the instance of a complainant, and the copyright owner derives no direct economic benefit out of the proceedings. Summary remedies deal with situations identified essentially as criminal. Civil remedies, on the other hand, are pursued by the injured party and, where granted, result in direct redress for the infringement. Redress generally takes the form of injunctions, damages and accounts. The Act also provides supplementary remedies which mostly deal with questions of importation.

The present Act also provides for a number of presumptions that have an effect on the remedies granted, either by assisting the plaintiff in the presentation of evidence that his copyright was infringed, or by helping the defendant to establish that he has not infringed. Summary and civil remedies will be examined separately, but first these presumptions will be discussed, as, to a great extent, their operation qualifies certain remedies and under certain circumstances even prevents the granting of remedies.

### A PRESUMPTIONS - THE INNOCENT INFRINGER

Except where the Act states otherwise, "ignorance of the law is no excuse". This principle, however, is subject to many exceptions. For example, no summary remedies are available where the infringer has not acted "knowingly",<sup>1</sup> except where the infringer has suppressed the title or the name of the author. In all other instances, summary remedies are not applicable if the infringer did not have knowledge of the fact that he was committing an act of infringement.

With respect to civil remedies, exceptions to the principle that ignorance is no excuse are two-fold. They stem either from ignorance of the existence of the particular copyright (under s 22) or from ignorance of the fact that what was done constituted an infringement (under subsections 17(4) and 17(5)).

Section 22 provides:

Where proceedings are taken ... and the defendant ... alleges that he was not aware of the existence of the copyright, ... the plaintiff is not entitled to any remedy other than an injunction ... if the defendant proves that ... he was not aware, and had no reasonable ground for suspecting that copyright subsisted in the work.<sup>2</sup>

If the courts had interpreted this section literally, copyright owners would have found themselves in an almost untenable situation. However, jurisprudence has considerably narrowed the scope

1. Copyright Act, sections 25 and 26.

2. The effect of s 22 is that there is absolute liability in the case of direct infringement; ignorance of the subsistence of copyright merely narrows the range of remedies available to a single remedy if necessary.

of s 22 by applying the interpretation of Copinger, a copyright authority, with regard to the meaning of "had no reasonable ground for suspecting that copyright subsisted in the work". Copinger's comments were made part of the decision in the landmark case of Gribble v Manitoba Free Press. Quoting verbatim, the Court made the following point:

In what case, then, can the section apply? What reasonable ground can a direct copyist have for not suspecting the work he copies to be the subject of copyright? It is submitted that the proper attitude of mind of a copyist towards a work that he copies is that copyright in the latter subsists, unless he has evidence to the contrary (...) But it is submitted that no person has a right to assume, without inquiry, that a work published anonymously is not the subject of copyright.

This position was confirmed, through use of the same quotation, in Zamacois v Douville.<sup>2</sup> It appears that it is now well established that, in matters of direct infringement, there exists a rebuttable presumption that the infringer had grounds to suppose that copyright subsisted in the work. By virtue of the last part of s 22, this presumption becomes irrebuttable where the copyright has been registered. Section 22 reads:

... if at the date of the infringement the copyright in the work was duly registered under this Act, the defendant shall be deemed to have had reasonable ground for suspecting that copyright subsisted in the work.

This presumption in favour of the copyright owner is one of the main benefits of registration.<sup>3</sup> Although narrow in scope, dealing solely with direct infringements and in regard to civil remedies only, the presumption in s 22 is the only presumption of knowledge in the Act. There are presumptions for the existence of copyright (s 36(2); and s 20(3)(a)), authorship (s 20(3)(c)), and ownership (s 36(2); s 20(3)(b); s 12(3); and s 20(3)(d)). But the presumption in s 22 remains the only one of its kind, almost addressing itself to the substance of mens rea. It should therefore be noted that the abolition of the registration system as recommended<sup>4</sup> would result in the disappearance of the presumption, the only element

1. Gribble v Manitoba Free Press: (1931) 3 WWR 570 at p 580.

2. Zamacois v Douville: (1943) 3 Fox Pat C 44.

3. It has been suggested that nationals of Berne Convention countries might not have to register their copyrights to be entitled to a similar presumption. Article 15 of the Rome Text of that Convention states: "In order that the author ... be regarded as such ... it shall be sufficient for his name to appear on the work in the usual manner". (see Le Droit d'auteur, 15 juil.1921, p 75).

4. See p 209, below.

presently restoring a measure of balance between the copyright owner and the innocent infringer.

In the absence of registration, the effects of s 22 can be drastic if the infringer can establish that he had no reason to suppose that copyright subsisted in the infringed work. In such a case, the only remedy available to the plaintiff would be an injunction. He cannot get an account of profits, nor can he be put in possession of the infringing copies, nor can he recover damages.

However, these results are insignificant in comparison to the potent consequences of s 17(4) and s 17(5) which deal with specific so-called "indirect infringements". Under these sections, knowledge becomes a necessary condition of liability. Where the defendant has no knowledge that he has infringed copyright, no remedies whatsoever are available to the plaintiff. Furthermore, the kind of knowledge required by the sections is highly technical in nature, and therefore more easily dismissed. The infringer must know he is infringing; even where he knows copyright subsists in a work, the infringer can avoid liability by proving he did not know he was committing an act of infringement. It is often the case, for example, that a hotel manager does not know that performances given by the musicians he hires are infringing copyright in various musical works, although he knows that copyright subsists in these works; s 17(5) would provide a valid defence.

The Ilsley Commission dealt at length with the question of the innocent infringer.<sup>1</sup> It recommended following s 17(2) of the UK Copyright Act worded:

Where in an action for infringement of copyright it is proved or admitted -

- (a) that an infringement was committed, but
- (b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject matter to which the action relates,

the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

The Commission suggested, however, that the following changes be made in that section:

- (i) We think that paragraph (b) should be "that at the time of the infringement the defendant was not aware, and had no reasonable grounds for supposing that it was an infringement of copyright.

...

We have suggested the word "supposing" rather than the word "suspecting" as a slightly fairer word to use. "Supposing" is the word used in the

1. Ilsley Report, op cit, pp 83-84.

innocent infringement section of the United Kingdom Patent Act.

- (ii) We think that the words "but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not" should be omitted and that the word "damages" should be changed to "pecuniary remedy". Under our Act (Section 22) the plaintiff in proceedings taken in respect of infringement is not entitled to any remedy other than an injunction against an innocent infringer. This, we think, is the correct principle.<sup>1</sup>

As expected, this last statement has strongly challenged by theorists<sup>2</sup> and industry alike.

It is evident that s 17(2) of the UK Act is more generous toward the creator than s 22 of the Canadian Act. The rest of the UK Act is equivalent to the Canadian Act: UK Act s 5 corresponds to Canadian Act s 17(4), making knowledge a necessary condition of liability in indirect infringements. Similarly, no summary remedies are available under the British Act unless it is proved that the infringer had knowledge of the infringement.

In Canada, owners of copyright have made strong representations for changes in the present presumptions. Owners rallied behind the Circle Film<sup>3</sup> decision in which Supreme Court Justice Judson stated that he could see no reason why an amendment to s 20(3)(b) had enacted a presumption of ownership in favour of the author, rather than in favour of the plaintiff, when the title of the plaintiff was put in issue.

Copyright owners submitted that not only should the presumption be reinstated in favour of the plaintiff, but also that it should be strengthened.<sup>4</sup> It should be noted that reverting to the original presumption in favour of the plaintiff rather than the author would render nugatory the present s 20(3)(d), which reads:

In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto,

(...)

and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act, then, in any such case,<sup>5</sup>

(...)

1. Ilsley Report, op cit, p 83.

2. See Boncompain, op cit, p 306.

3. Circle Film Enterprises v CBC: (1954) 17 Fox Pat C 1 at pp 15-16.

4. The presumption of ownership in favour of the employer (s 12(3)) has been discussed in Part III under "Ownership" p 69, above.

5. The requirement of this paragraph would, of course, also be rendered obsolete by the abolition of the registration system.

if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed, or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.

With respect to the present s 17(4) and the requirement of knowledge for indirect infringement, copyright owners saw no reason why they should be placed in a weaker position vis-à-vis the indirect infringer than they are vis-à-vis the direct infringer. Indirect infringements as envisaged by s 17(4), can normally only be carried out by traders or merchants and it is difficult to understand why the latter should be put in a more favourable position than other infringers. If anything, by the very fact that they are traders, indirect infringers have even less of an excuse for being ignorant of the law.

For their part, users of copyright material had little to say about presumptions. Librarians were the only users to address themselves to this issue, submitting that there should be a broad exemption in their favour, in the form of a presumption that a library is an innocent infringer.<sup>1</sup>

Finally, neither owners nor users of copyright raised any question with respect to the presumption of authorship found in present s 20(3)(c) which reads:

if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work.

It is submitted that this presumption should be retained in any new Act, since it accords with Article 15 of the Berne Convention.

With this in mind, and considering the effect of the abolition of the registration system (removal of the presumptions that result from it) it becomes apparent that the copyright owner can be put in a tenuous position vis-à-vis the so-called "innocent" infringer. On the other hand, the law should recognize the relative innocence of an indirect infringer. The following recommendations are made with a view to clarifying these situations and giving equitable consideration to the innocent infringer, and yet not putting the copyright owner in jeopardy.

#### *RECOMMENDATIONS:*

1. *That the present rebuttable presumption in s 20(3)(a) concerning the existence of copyright be retained in*

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1. Such special exemptions for libraries are discussed in Part III, p 166, above.

*any new Act: where the existence of copyright, or title thereof, is put in issue, the work is presumed to be in copyright.*

2. *Similarly, that the present rebuttable presumption in s 20(3)(c) concerning authorship be retained in any new Act: where the work bears a name purporting to be that of the author, the person whose name is indicated shall be presumed to be the author of the work.*
3. *That there be a rebuttable presumption of copyright ownership in favour of the plaintiff, rather than in favour of the author.*
4. *That, in order to assist in proving ownership, in the absence of a registration system, there be a statutory right to enter assignment documents as evidence, as well as a prima facie presumption that such documents reflect the truth of their contents.*
5. *That "innocence" be a defence only with regard to indirect infringement.*
6. *That, in any new Act, "innocence" not be interpreted as meaning ignorance of the existence of copyright but only as not knowing that what was done constituted an infringement, or not having reasonable grounds for knowing that it would likely infringe.*
7. *That, where "innocence" is established, damages not be recoverable, but that all other remedies be available.<sup>1</sup>*

## B SUMMARY REMEDIES

Summary remedies are provided by sections 25 and 26 of the present Act. They are available against anyone who makes, sells, distributes, exhibits in public or imports infringing copies, possesses plates for the making of infringing copies, or performs a protected work without authorization. In all of these instances, as stressed under the previous section dealing with presumptions, knowledge is of the essence. No summary remedy is available if it is not proved that the infringer had the necessary knowledge.

Summary remedies are also available against whoever "makes or causes to be made any change in or suppression of the title, or the name of the author" whether or not this was done knowingly.<sup>2</sup>

- 
1. i.e.: injunction, delivery up, accounting.
  2. In addition, section 115 of the Criminal Code provides that: "Everyone who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years."

The Act provides for fines (ranging up to a maximum of \$500) and, in the case of subsequent offences, for the same fines or imprisonment (for maximum terms ranging from 2 to 4 months) with or without hard labour. Where relevant, the court may, whether there is a conviction or not, order the disposition of infringing copies and plates.

With regard to limitations, it should be recalled that although the Act itself has no specific provision in that regard, an action in respect of infringement of copyright, as far as summary remedies are concerned, cannot be commenced beyond the 6-month period after the infringement.<sup>1</sup>

The Economic Council, after stating that the remedies of the present Act appeared to be "thoroughly adequate in scope", recommended:

That the government consider raising the severity of the penalties to a level more appropriate to modern conditions. It is also suggested that consideration be given to ways that would enable infringement cases to be processed with more dispatch and at a lower cost, since certain cases of abuse have been brought to our attention in which greater speed of enforcement would solve certain problems. In this way the penalties deterrent effects could become more relevant than the retributive ones.<sup>2</sup>

The Iilsley Commission rather concentrated on s 21 of the UK Act, in effect recommending its adoption with some changes made necessary by the Commission's recommendation concerning special exemptions for public libraries and institutions of learning. The Commission also recommended that the present penalties not be increased in the new Act. As the Commission put it:

True, the value of money has decreased since the enactment of our Copyright Act and it could be argued that *prima facie*, the amounts of the penalties should be increased. Moreover, it was represented to us that the present penalties are entirely inadequate. It was proposed that in addition to the \$10.00 or \$200.00, as the case may be, a fine equal to the gain of the offender would be appropriate. It was also submitted that the penalty for a second or subsequent offence should not be, as now, only a fine or imprisonment but a fine or imprisonment or both. It was also submitted that for the purpose of summary (as well as civil) remedies an infringement by a resident of Canada resulting in further reproduction outside Canada should be deemed to be an infringement in Canada with respect to the total number of copies resulting. We are not satisfied either that the general scheme of the summary remedy proceedings of our Act and of the

1. Criminal Code, sections 721(1) and 721(2). The Criminal Code sections apply by virtue of section 27(2) of the Interpretation Act.
2. Economic Council Report, op cit, p 155.

new United Kingdom Act is ill-considered, or that any defensible increase in the present penalties would act as a greater deterrent to infringement.<sup>1</sup>

The Iilsley Commission further recommended that the delivery up of infringing copies or plates be available as a summary remedy only where the infringer has been convicted. The Commission stated that

this would be more consistent with our recommendations with regard to civil remedies against innocent infringers. Moreover, summary proceedings are quasi-criminal in nature and it would seem anomalous to empower a magistrate in cases where no guilt is proved to proceed nevertheless to make an adjudication of a civil character.<sup>2</sup>

Apart from its general requirement that member states undertake "to provide for the adequate and effective protection of the rights of authors",<sup>3</sup> the UCC has no provision dealing with remedies. On the other hand, Article 4 of the Berne Convention (Rome Text) provides that Union authors shall enjoy in every Union country the rights granted by law to nationals and, further, that the extent of protection as well as "means of redress" shall be governed by the laws of the country where protection is claimed. Therefore Union countries are required to provide remedies, but each country is free to establish the kind of remedy it deems necessary or appropriate. Ladas states:

However, from the whole import of the Convention, it is to be concluded that a provision for a criminal penalty only would not be a sufficient compliance with the Convention. Inasmuch as this purports to protect the material and moral interest of the authors in their works, an infringement of their rights should, in each country, entail a liability for damages, and an order of the court prohibiting further infringement.<sup>4</sup>

Ladas does not say however whether the opposite is also true, i.e. whether civil remedies alone could be considered sufficient.

In fact, a case can be made for the abolition of summary remedy provisions. In practice they have been used only in very rare instances, and even some members of the private sector have recommended their abolition. The abolition of summary remedies would be consistent with recommendations made in other fields of intellectual property. More importantly, abolition would be consistent with the principle that copyright is a private right that should not be enforced by the government but rather by those who have a legal interest in obtaining redress for their infringed rights.

1. Ilsley Report, op cit, pp 89-90.

2. idem, p 90

3. UCC, Article 1.

4. Ladas, op cit, (vol 1) p 606.

With respect to the argument that summary remedies provide for speedier justice, and that "justice delayed is justice denied", it may be answered that offering a wider choice of remedies is not in itself a solution to the fact that the courts are clogged.

The question of summary remedies involves sociological issues; punitive provisions are legislated where it is absolutely certain that drastic punishment is the most efficient method for correcting a criminal attitude.

The present summary remedies are directed against individuals acting as such. The provisions are framed in terms of determining guilt and punishing individuals, i.e. natural persons only. In considering the value and applicability of summary remedies, sanctions should also be provided against groups and corporations by which copyright is infringed.

To find groups or corporations guilty of the degree of knowledge generally applicable to individuals would be to stretch the concept of knowledge beyond that required for individual responsibility. While corporations may be found culpable and liable, the degree of fault must vary with the facts, and with the difficulties of attributing responsibility to an individual in a diffused corporate structure.

Furthermore, the nature of the offences subject to summary remedies is not so antisocial as to be considered offensive to the fundamental values of society. It is becoming more widely accepted that imprisonment of individuals where a fine is not paid should be eliminated. For example, the European Community is actively engaged in revising its legislation to delete references to punishment or retribution. Some countries leave sentencing to an interdisciplinary committee composed mostly of sociologists. The judge alone finds an accused guilty or not guilty, but the sentence itself is left to other specialists. In Sweden, fines are often expressed in terms of multiples of a day's salary, which has the advantage of reducing some of the economic disparities among those who are found guilty.

On the other hand, one cannot ignore the fact that various foreign copyright laws have summary remedies provisions. Some countries, notably the USSR, do not permit summary and civil remedies to be cumulative. But most countries provide for summary remedies that are at least as severe as the present Canadian provisions. In the new US Copyright Act, penalties for wilful infringement of sound recordings will reach a maximum fine of \$25,000 or one year's imprisonment or both for the first offence; and a fine of \$50,000 or two year's imprisonment or both for subsequent offences. Reflecting the concern for the growth of sound recording piracy in the US, an impressive number of individual States have passed their own legislation making record piracy punishable by enormous fines.

Views have been expressed in favour of corresponding increases in summary remedies in the Canadian Copyright Act. It was submitted that, while civil remedies are important and useful in certain circumstances, piracy on a massive scale cannot properly be dealt with unless effective criminal remedies exist not only to punish the guilty but also to act as a deterrent to those who might contemplate engaging in such activity.

Admittedly, the temptation is strong to rely on sanctions of a criminal nature for protection. However, it is submitted that,

in dealing with summary remedies, one should be guided by the following principles:

- a) A right has not been enforced, in the strict sense, when the infringer has been punished. Apart from being 'avenged', the offended copyright owner derives no benefit from a criminal sanction. Therefore, such a sanction does not redress the economic injustice sustained.
- b) The onus of pursuing legal remedies should lie with the owner of the copyright and not with society as a whole. While society suffers to the extent it permits infringement to be unpunished, individual rights should be asserted by individuals.
- c) The deterrent effects of criminal sanctions can be achieved by other means, such as punitive damages.
- d) Criminal sanctions are essentially directed against individuals and are not easily applied to corporate responsibility.

In accordance with these principles, it is submitted that summary remedies should be abolished.

*RECOMMENDATION:*

*That no summary remedies be provided in any new Act.*

**C CIVIL REMEDIES**

If the recommendation pertaining to summary remedies is to be adopted, more extensive civil remedies will be necessary. This section is therefore predicated on the recommendations made in the preceding sections. The discussion also takes into account that Canada has two legal systems: the civil law and the common law system. Procedures or even remedies which could be implemented under one system could not necessarily be implemented under the other if they were not provided in a federal statute.

The Ilsley Commission dealt at length with civil remedies, in the light of the (then) new UK Act, and recommended: (1) that the present limitation period of three years to bring an infringement action not be altered in Canada; (2) that owners of copyright be entitled to all general remedies available under the present Act; and (3) that, as in the present Act, no injunction be allowed to prevent the construction of a building or to force its demolition. More importantly, the Commission recommended that in assessing damages the courts be empowered to award exemplary damages, having regard to the flagrancy of the infringement. The Commission added that, where damages are recoverable, the plaintiff should also have the right to an account of profits as incidental to the assessment of damages.

With respect to infringing copies and plates, the Commission stated that, where the infringer is innocent,

the copyright owner should have the option of taking the infringing copies off the person's hands at cost or of leaving them in his hands, to be disposed of by him, in which latter event the person would be obliged to account to the copyright owner for the profits. So long as the copyright owner exercises neither option the person should be free to dispose of the infringing copies, accounting for the profits (earned after he receives notice they are infringing copies). This option should be exercisable by the copyright owner not only at the beginning of or in an infringement action but before or in the absence of an action. A notice of exercise of the option at any time should result in the person being liable to deliver up the infringing copies forthwith (being compensated for the cost) or to account for profits thereafter as the case may be.

In all cases a person whether innocent or otherwise should be liable to deliver up infringing plates on notice without compensation, or for damages if he retains them.<sup>1</sup>

It should be noted that, in the Commission's views, the "guilty" infringer should be liable to deliver up the infringing copies, as well as the infringing plates. Finally, the Commission addressed itself to the lack of the right of an exclusive licensee to sue for infringement, recommending that the new Act make provision for such a right. The major changes proposed by the Ilsley Commission thus only involved the introduction of punitive damages, and the delivery up of infringing copies and plates.

In the present Act, s 20(1) provides that copyright owners are entitled to "all such remedies by way of injunction, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right". Damages may be those suffered due to infringement and, additionally, such part of the profits as the court may decide. Injunctions are available except with respect to demolishing or stopping the construction of a building that infringes. Infringing copies, and plates used for their production, are deemed to be the property of the owner of the copyright, who accordingly may take proceedings for recovery. Again, this remedy does not apply to an infringing building. Nor does it apply to illegally imported copies, as by virtue of s 12 of the Customs Tariff Act, although such copies may be infringing, they do not belong to the copyright owner, but to the Crown.

Concurrent jurisdiction with the Federal Court is conferred on provincial courts and an action can be brought in a county or district court with the appropriate damages jurisdiction. Costs are in the absolute discretion of the court.

By virtue of s 20(5), anybody having an interest in the copyright may sue for infringement to the extent of that interest. That action reads (emphasis added):

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1. Ilsley Report, op cit, p 85.

The author or other owner of any copyright or any person or persons deriving any right, title or interest by assignment or grant in writing from any author or other owner as aforesaid, may each, individually for himself, in his own name as party to a suit, action, or proceeding, protect and enforce such rights as he may hold, and to the extent of his right, title, and interest is entitled to the remedies provided by this Act.

Concern has been expressed with respect to the right of the exclusive licensee to bring an action in his own name.<sup>1</sup> It might therefore be appropriate to recommend that legislative draftsmen review the situation in the light of that concern.

Industries are also concerned with remedies in general, usually recommending that they be increased and made more readily accessible. It was suggested that this might be achieved by providing increased damages and by introducing both statutory as well as punitive damages in a new Act. A recurring complaint of copyright owners was that the courts seem to take a light view of copyright infringements. The introduction of statutory and punitive damages was seen as an excellent way of convincing the courts that these are serious matters. This, in turn, according to copyright owners, would facilitate obtaining injunctions for copyright infringements. Moreover, both increased and punitive damages would serve as supplementary deterrents to infringement.

Different (not necessarily opposite) views were taken with respect to statutory damages. While most private interests were satisfied with making general representations in favour of introducing statutory damages in a new Act, some copyright owners qualified this request by stating that such damages should be awarded only where the infringement was intentional and for the purpose of commercial advantage or private financial gain. In such cases, the damages envisaged would be a minimum fixed by statute. Other interests recommended that statutory damages be available to the plaintiff at his election. The same interests also said that the new Act should specify that the plaintiff may obtain a broad injunction that would not only prevent the infringement of a particular work, but would also encompass works of a similar nature or of the same general class. Finally, one group of creators submitted that the limitation period for commencing an action should be extended to five years following the infringement.

The decision to provide for any of the above is not constrained by convention requirements. The conventions only require that remedies be provided, each member state being free to establish the kind of remedies it deems necessary or appropriate. Since the arguments against summary remedies are also valid against statutory remedies neither is being suggested for any new Copyright Act.

However, in assessing damages, the courts should be directed by statute to take into account the elements which are considered to warrant those remedies, specifically, the flagrancy of the

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1. See Ashton-Potter Ltd. v White Roses Nurseries Ltd.  
7 CPR 2d 29 at p 35 (appealed: 9 CPR 2d 112)

infringement and the need for deterrence. In other words, a new Act should allow for the granting of punitive damages. It is believed that such damages could adequately replace the deterrent effect lost in abolishing summary remedies, while at the same time entrenching the principle that copyright is a private right that should be enforced by (and, consequently benefit) the interests involved. As it should not be the government's role to enforce the copyrights or private interests, the benefits of any damages granted on the basis of a deterrent effect should accrue to those private interests.

Another advantage of introducing punitive damages in a new Act is that the scope of such damages could be broadened to reflect situations where pre-litigation conduct was uncooperative or where the defence lacked merit. Should punitive damages be awarded in such situations, it is submitted that litigation would be kept to a minimum.

If damages must be tailored to each particular case, it is submitted that injunctions must be even more so and that such an extraordinary remedy should not be unduly broadened. In fact, although some interests argued that they have encountered some difficulty in being granted a broad injunction in respect of many works or a class of works, it does not appear to be warranted that any new Act should specifically recognize the right to be granted such a broad injunction. The present discretion of the courts in these matters should be respected.

Similarly, the substance of s 23(1) of the present Act dealing with injunctions for the construction or demolition of a building should not be changed. It is obvious that stopping the construction of a building or having it demolished, because of an actual or eventual copyright infringement, creates a bigger problem than such an action would solve.

On the other hand, with respect to other categories of works, both performing right societies have experienced difficulty in obtaining injunctions against acts that were manifestly preparatory to infringements. The Act could be reworded to provide that the copyright owner may seek an order to suspend any manufacture or public performance, in progress or announced, which constitutes an infringement or an act manifestly preparatory to infringement.

Another problem which has been encountered by performing right societies stems from section 50(10). The section reads as follows:

No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties that have been approved as aforesaid.

The section states that, as long as a person tenders the proper fees, any action based on the infringement of a performing right must be stayed. As it stands, this is capable of causing considerable difficulty and inconvenience to performing right organizations. The section was designed to deal with the hypothetical case of an organization which refuses to issue its licences to certain individuals. While it properly reflects the principle

that music users have an absolute right to tender the fees for a licence, the section should distinguish that situation from that where a person fails to obtain a proper licence, becomes a copyright infringer, and then attempts to extricate himself by tendering the proper fee.

It is submitted that any new Act should provide that it is no defence to copyright infringement for a person to tender, after the fact, licence fees which according to the licence could only have been paid before a performance occurred.

Many interests suggested that remedies should be made more easily accessible but none had specific recommendations on how this could be achieved. However small, one step towards that goal would be to provide the copyright owner with a right of "discovery".<sup>1</sup> Such a right would entitle the owner of the copyright to force anyone to disclose whether he possesses, for commercial purposes, a copy of any protected subject matter, and if so, to disclose from whom such copy was acquired. In order to ensure that such a right is available in both civil law and common law provinces, it would apparently have to be specifically provided for in the Copyright Act.

One remedy presently provided is found in s 21:

All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

There are three exceptions to this principle, two of which are found in the Copyright Act. Section 23(2) provides that s 21 does not apply to buildings, and s 25(3) provides that, where the plaintiff opts for summary remedies, it is the court before which he appears that will decide on the disposition of the infringing plates and copies. Finally, by virtue of s 12 of the Customs Tariff Act, works imported in violation of Schedule C of that Tariff are forfeited to the Crown.

In the common law provinces, s 21 probably gives rise to a replevin action or to an action similar to an action in detinue. In Quebec, this section would give rise to seizure, either as a main action, or incidental to a main action. In the latter instance, seizures would be available before, during or after the main action; they would also be available against third parties.

It has been brought to the attention of the Department that since provisions for search and seizure do not presently exist in the Act, search warrants must be obtained and seizures effected under the provisions of the Criminal Code (s 443); but there would

1. An examination for discovery is a pre-trial proceeding whereby one party can obtain information under oath which would otherwise be within the particular knowledge of the other party.

appear to be conflicting authority on whether or not such a procedure is permissible. Consequently, it has been urged that search and seizure provisions be provided in the Copyright Act.

It is submitted that s 21 adequately provides for seizures in both the common law and civil law provinces.

However, the remedy provided by the presumption of s 21 could be considered excessive. While the principle should be retained that the copyright owner whose work is being infringed should be given control of the infringing copies, it appears unwarranted that such copyright owner should be made the outright owner of those copies, without regard to the possible innocence of the infringer. As was said in the Ilsley Report, an innocent infringer might:

have no means of obtaining any authentic information from an official source as to the subsistence of copyright or the identity of the owner of the copyright (and it would be) unfair that he should be penalized with financial losses which would fall upon him if he were ordered to deliver up infringing copies in his possession ...<sup>1</sup>

With this principle in mind, the Ilsley Commission proposed that, in all cases, infringing plates be delivered up to the copyright owner; infringing copies however would be delivered only by the "guilty" infringer. Where the infringer is innocent, the copyright owner would have the option of either taking the copies off the infringer's hands at cost, or of leaving them in his hands to be disposed of by him, providing there is later an accounting of profits. It is suggested that this remedy is more satisfactory than the one granted by s 21 of the present Act, as it still places the control of the infringing copies and plates where it ought to be, i.e. with the copyright owner, while at the same time allowing for a certain balance between the interests of the copyright owner and the innocent infringer. Such a solution with respect to infringing copies and plates should be adopted in any new Act.

Another change in remedies is in order with respect to moral rights. At present, the only remedies available to an author are the opportunities to "claim" authorship and to "restrain" the infringing act.<sup>2</sup> In practice, the author whose moral rights have been infringed is limited to seeking an injunction.

Strong representations have been made to the Department for upgrading the remedies available for infringement of a moral right. If, as it has been argued, moral rights are an intrinsic part of copyright, equivalent in importance to pecuniary rights, it stands to reason that infringement should be subject to the same remedies, and not limited to the sole remedy of injunction. In particular, the violation of an author's moral rights should give rise to damages. The argument cannot be maintained that, because a pecuniary award

1. Ilsley Report, op cit, p 85.

2. Copyright Act s 12(7); it is open to question whether the word "réprimer" in the French version of the Act is broader than the English "restrain" and therefore whether damages may be awarded for infringement of a moral right, based on the French version of the Act.

could not really compensate for a moral right infringed, damages should not be granted for such infringements. The fact that a perfectly adequate remedy cannot be found does not mean that no remedy should be provided at all.

It is therefore submitted that all general remedies presently possible where a pecuniary right has been infringed should similarly be made available to the author whose moral rights have been violated.

Moreover, a new Act should provide for additional remedies tailored to situations involving moral rights infringements. For instance, as was stated by Justice Gibbs in the Australian case of University of New South Wales v Moorhouse et al:

There is no doubt that a declaration may be an appropriate remedy in an action brought by an owner of copyright to assert his rights, but a declaration will as a general rule not be made for that purpose unless it is established either that an actual infringement has occurred or that the defendant intends to take action that will amount to an infringement.<sup>1</sup>

This difficulty would probably also arise in Canada. Considering that in some instances, a declaratory judgement might be the most appropriate remedy for infringement of a moral right, it should be included in any new Act, as an addition to the remedies available under the present s 20(1).

Similarly, a new Act might also provide for compulsory identification, without prejudice to any other remedy, where the moral right to claim authorship is infringed. For example, such identification could be by way of broadcasting, communications in the media, insertion of errata in undistributed copies of a work, etc...

There would possibly be instances, however, where the nature of the author's work would prevent the insertion of errata in undistributed copies (e.g.: graphic works such as stamps or coins). Such situations could be dealt with by communications in the media or by damages.

Taking the above into consideration, the following recommendations are made:

#### *RECOMMENDATIONS:*

1. a) That the principles in s 20(5) be maintained in any new Act, specifically: the author or owner of any copyright or any person or persons deriving any right, title or interest by assignment or grant in writing from any author or other owner as aforesaid, may each, individually for himself, in his own name as party to a suit, action, or proceeding, protect and enforce such rights as he may hold.
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1. University of New South Wales v Moorhouse et al, High Court of Australia; Sydney, August 1, 1975, p 6.

- b) That the principles in s 20(1) also be maintained in any new Act, specifically: any person deriving an interest in a copyright is entitled, to the extent of that interest, to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right, insofar as these remedies are consistent with other provisions of the Copyright Act.
2. That no statutory damages be provided in any new Act.
  3. That, in assessing damages, the court be directed to take into account the following criteria:
    - a) the actual damages suffered by the plaintiff;
    - b) the benefits which might have accrued to the infringer. In this respect, the court may order an account of profits;
    - c) the flagrancy of the infringement, including repeated infringements of a related type;
    - d) where the defence lacks merit, or where prelitigation conduct was uncooperative, the actual reasonable costs of investigation, preparation and litigation;
    - e) the need for deterrence and likelihood of a deterrent effect;
    - f) such further criteria as shall be determined by regulation from time to time.
  4.
    - a) That the possibility of a broad injunction covering many works or a class of works not be specifically recognized in any new Act.
    - b) That an injunction not be available where infringement occurs due to the construction or demolition of a building.
    - c) That the court have the discretion to order the suspension of any manufacture or public performance, in progress or announced, which constitutes an infringement or an act which the court considers manifestly preparatory to infringement.
  5. That it not be a defence to an action for copyright infringement for a person to tender, after the fact, licence fees which, according to the licence, could only have been paid before a use which was otherwise prohibited.
  6. That a statutory right of discovery be included in any new Act, whereby a copyright owner may, by court order, require anyone to disclose whether that person has or has had possession, for commercial purposes, of a copy of any protected subject matter, and if so, to disclose from whom such copy was acquired.
  7.
    - a) That a person, whether innocent or otherwise, be liable to deliver up infringing plates on notice, without compensation, or for damages if that person retains them.

- b) That the guilty infringer also be liable to deliver up infringing copies on notice, without compensation, or for damages if he retains them.
  - c) That, where the defendant is "innocent", the copyright owner be given the option of acquiring the infringing copies at cost, or of leaving them to be disposed of by the defendant, in which latter event the defendant would have to account to the copyright owner for the profits.
8. a) That infringement of a moral right give rise to all remedies such as injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of any other right.
- b) That a right to a declaratory judgement be introduced as an addition to the remedies presently provided in s 20(1).
- c) That any person who distributes a protected work without indicating the name of the author be obliged where possible to disclose the identity of the author by suitable means related to the use of the work (e.g.: broadcasting, insertions of errata, or communications in the media).
9. That the present limitation period of three years be maintained in any new Act.

## VII IMPORTATION PROVISIONS

Importation is a means of indirect infringement of copyright, the relevant provisions regarding which are found in Section 17(4).<sup>1</sup>

In addition to that section, the present Act provides certain administrative procedures whereby Revenue Canada may be requested to ban the importation of certain works.

### 1. Administrative Provisions

The sections which presently establish these procedures are:

27. Copies made out of Canada of any work in which copyright subsists that if made in Canada would infringe copyright and as to which the owner of the copyright gives notice in writing to the Department of National Revenue that he is desirous that such copies should not be so imported into Canada, shall not be so imported, and shall be deemed to be included in Schedule C to the Customs Tariff, and that Schedule applies accordingly.

28.(1) Where the owner of the copyright has by licence or otherwise granted the right to reproduce any book in Canada, or where a licence to reproduce such book has been granted under this Act, it shall not be lawful except as provided in subsection (3)

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1. See Infringement, p 176, above.

to import into Canada copies of such book, and such copies shall be deemed to be included in Schedule C to the Customs Tariff, and that Schedule applies accordingly.

(2) Except as provided in subsection (3), it shall be unlawful to import into Canada copies of any book in which copyright subsists until fourteen days after publication thereof and during such period or any extension thereof such copies shall be deemed to be included in Schedule C to the Customs Tariff, and that Schedule applies accordingly, but if within that period of fourteen days an application for a licence has been made in accordance with the provisions of this Act relating thereto, the Minister may in his discretion extend the period, and shall forthwith notify the Department of National Revenue of such extension; and the prohibition against importation shall be continued accordingly.

(3) Notwithstanding anything in this Act it shall be lawful for any person

(a) to import for his own use not more than two copies of any work published in any country adhering to the Convention;

(b) to import for use by any department of the Government of Canada or any province, copies of any work, wherever published;

(c) at any time before a work is printed or made in Canada to import any copies required for the use of any public library or institution of learning;

(d) to import any book lawfully printed in Great Britain or in a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in Schedule II and published for circulation among, and sale to the public within either; but any officer of customs, may in his discretion, require any person seeking to import any work under this section to produce satisfactory evidence of the facts necessary to establish his right so to import.

(4) This section does not apply to any work the author of which is a British subject, other than a Canadian citizen, or the subject or citizen of a country that has adhered to the Convention and the Additional Protocol thereto set out in Schedule II.

These sections provide administrative procedures for invoking the aid of the State in pursuing private rights. Section 27 provides an owner of copyright with the possibility of having barred from importation into Canada copies of any work in which he owns copyright. Section 28 provides to a licensee the same general rights to have barred from Canada books in respect of which he has a licence to reproduce in Canada.

The nature of the relationship between section 27 and section 28 is difficult to understand. It would appear that section 27 enacts a general rule applicable to any work in which copyright subsists, whereas section 28 is limited to those instances where copyright subsists in a book. The provisions of section 27 apply to all works which have been printed or made outside Canada by a person who, had he printed them or made them within Canada, would have infringed the copyright; the section is not limited to those editions which have been illegally printed in the country of publication.

The view is consistent with the view expressed in respect of corresponding provisions of the UK Act, (Section 22):

it affords a simple method of enabling an English publisher to prevent the flooding of his market with cheap foreign reprints. Such reprints may well have been made under licence from the author for sale abroad, but they can still be restricted under these provisions, if imported, because the licence would not cover manufacture in England.<sup>1</sup>

A difficult question is whether the clear prohibition which is found in section 27 of the Canadian Act is subject to the exception in section 28(3).

The opening words of section 28(3) provide that "notwithstanding anything in this Act", the provisions of the section are to apply with respect to the importation into Canada of works produced elsewhere; and section 28(4) provides that the section applies to works whose authors are Canadian citizens or citizens of countries not adhering to the Berne Convention.

If an author is a Canadian citizen, all the provisions of section 28 apply including the exception of section 28(3). Consequently, despite the prohibition set forth in section 27 of the Act, a person is entitled to import into Canada, by virtue of section 28(3)(d) of the Act, books lawfully printed in Great Britain or in a foreign country adhering to the Convention and Additional Protocol.

The validity of such an interpretation, however, depends on the premise that, despite its general wording, s 28(3) only applies if by virtue of s 28(4), the whole of s 28 is applicable. It further depends on the assumption that, where the requirements of s 28(4) are met, s 28(3) is applicable to the situation envisaged by s 27.

These difficulties exemplify the problems faced by Revenue Canada in attempting to administer these abstrusely worded provisions.

The origins of s 28(1) are found in the Canadian "manufacturing clauses" from the era when it was considered necessary to provide to licensees rights equivalent to those provided to owners by s 27. Such provisions reflected the concerns at that time with the US manufacturing clause. As the repeal of the Canadian "printing clause" is recommended,<sup>2</sup> there is no longer any need to provide supplementary remedies for those licensees deriving their interest from the compulsory licences of the "printing clauses" sections.

1. Copinger, op cit, p 265.

2. See p 78, above.

Sections 27 and 28 are not primary remedies against infringement by importation. Those are found in s 17. Sections 27 and 28 provide supplementary administrative procedures which utilize customs as a means of preventing importation of works coming within the sections.

There are problems with using such a method to deal with a copyright matter. The activation of customs officers in respect only of books is discriminatory in that there is no public policy reason why the rights of other owners of copyright should not be similarly protected. Moreover, it is difficult to see how Revenue Canada could properly enforce sections 27 and 28; not only do they lack sufficient personnel to carry out this task, but presumably the existing personnel cannot be expected to distinguish between "legal" copies, infringing copies, and copies made contrary to contracts and licences. In addition, the quantity of material that customs officers would have to check would be immense, if the provisions were enforced.

As suggested in the discussion on summary remedies, the onus of pursuing remedies properly lies with the owner of the copyright, and society should not be concerned with policing private rights.

Other particular issues surrounding these provisions have been brought to the attention of this department. These issues may be categorized as: the "buying around" problem; alleged dumping on the Canadian market, and the importation of remaindered copies into Canada.

## 2. "Buying Around"

Canadian representatives<sup>1</sup> of foreign publishers act as exclusive agents for the purpose of selling those publishers' books in Canada. Some Canadian buyers of foreign books, however, obtain their copies from a source other than the agent. It is claimed these purchasers circumvent Canadian agents by "buying around".

Agents have urged amendment to the Act, so that they may be sole importers of their principals' books. Certain Canadian publishers are also in favour of such an amendment because the profitable agency business makes possible the publishing of Canadian titles where lower rates of profit are experienced.

The Ilsley Commission considered this type of agency at some length:

Section 27 was the subject of sustained and vigorous representations by a number of book publishers and organizations representing book publishers ....

For the most part they are not the owners of the Canadian copyright in the books they import, but are exclusive selling or distributing agents of the copyright owners. The great bulk of the books they handle are imported by them from publishers in Great Britain, the United States and France. Until fairly recently they or some of them have been giving notices in writing to the Department

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1. Who in many instances are Canadian publishers.

of National Revenue that they were desirous that certain books should not be imported into Canada except by them.<sup>1</sup>

The Commission then noted the "Varcoe"<sup>2</sup> interpretation of s 27, which held that if that section were used to bar the importation of books into Canada it would create an absolute bar, including a bar against importation by agents.

It has been suggested that a new section replace sections 27 and 28, which would provide agents in Canada with the sole right to reproduce or import copies of any work for which they are the sole agents. This would effectively prevent "buying around".

### 3. Dumping

"Dumping" is the practice of selling an item in a country at a lower price than that prevailing in the country of origin. If a dumping situation exists in Canada, redress is available to those whose interests have been affected by resorting to the Anti-Dumping Tribunal. What has been called "dumping" by the publishing industry is, in fact, remaindering.

### 4. Remaindering

"Remaindering" occurs when a publisher has printed more copies of a book than can be sold at the initial price, and sells the "remainder" at lower prices to wholesalers. These wholesalers in turn sell the copies to retailers at prices which enable them to undercut the initial price. In large measure, copyright contracts stipulate lower royalties for remaindered copies.

In so far as copyright is concerned, the practice of remaindering falls within the provisions dealing with importation of lawful copies. This will be discussed in further detail below.

### 5. Infringement by importation

Section 17(4) of the Act provides copyright owners with a right of action against those who import copies which infringe copyright. Persons having no legal interest in the copyright, e.g. agents who distribute and sell works for their foreign principals, cannot bring such infringement proceedings.

#### (a) Importation of "Pirated" Copies

The importation of copies of protected subject matter that have been made illegally, i.e. without the authorization of the owner of the copyright, should be barred. It is recognized, however, that section 17(4) of the Act now provides an adequate remedy, subject to minor changes.

1. Ilsley Report, op cit, p 91.

2. Department of Justice opinion, March 12, 1953, rendered by T.P. Varcoe, then Deputy Attorney-General of Canada.

## (b) Unauthorized Importation of Lawful Copies

The view of the Economic Council was that copyright law should not be used to affect the Canadian price of foreign books. To help bring down these prices and to ensure "the maintenance of a healthy Canadian publishing industry", the Council recommended that copyright be removed as an import-restricting device. The Council suggested that sections 27 and 28 ought to be revised, "so that the law does not deny to anyone the right to purchase works protected by Canadian copyright in other countries where they also enjoy copyright protection, and to import these works into Canada".<sup>1</sup>

The Council's recommendation was based on "common knowledge" that foreign books "are often very noticeably more expensive in Canada than in their countries of origin" and that "on the average, the Canadian prices in the sample are about 30 per cent higher".<sup>2</sup>

The Council concluded "it is time for policy to strive to bring down the prices of foreign books in Canada and to find other ways of supporting native literature. As for the reduction of Canadian prices of foreign books, a contribution towards this should be made by revising sections 27 and 28 of the Copyright Act ..."<sup>3</sup>

The Council went on to say:

It is also the case that owners of Canadian copyright must take certain positive actions in order to invoke some of the import-restricting effects of the two clauses and that such actions have been relatively rare in recent years. But the mere threat of the invocation of section 27 probably has some import-deterring effect. It would seem better, therefore, to revise the two Sections as recommended and then to study additional means of bringing the prices of foreign books in Canada down to more reasonable levels.<sup>4</sup>

The Ilsley Commission, in considering importation, recommended the retention of section 17(1), (the general infringement prohibition), and the replacement of s 17(4) by a more detailed provision which would retain the substance of the present section but incorporate the exception allowing importation for private use, as well as special exemptions for institutions of learning and public libraries "of a class prescribed by regulations".<sup>5</sup>

Concerning these special exemptions, the Commission said:

1. Economic Council Report, op cit, p 154.
2. idem, p 152
3. ibidem, p 154 (emphasis added)
4. ibidem, pp 154-155 (emphasis added)
5. Ilsley Report, op cit, p 51.

Institutions of learning will infringe if they import for sale or hire books or other articles the making of which to their knowledge constituted infringement or would have constituted infringement if made in Canada. Otherwise they will not infringe. Is this assimilation of the position of institutions of learning not importing for sale or hire to that of persons importing for private use defensible? We have come to the conclusion that it is. The practice has gone on for a long time. Canadian agents of foreign publishers, rather than the authors, are, we think, the chief objectors. We cannot see that it is the function of copyright law to protect them.<sup>1</sup>

Consistent with this position, the Commission mentioned that sections 27 and 28 could be repealed. However, the Commission members could not agree whether there should be any additional remedy in respect of the importation of infringing copies.<sup>2</sup>

The book publishing industry has also repeatedly requested revision of the importation provisions on the grounds that its interests are not adequately protected by the present provisions. The industry recommended that s 28(3)(a) be removed and that the exemption allowing departments of the federal and provincial governments to import books be amended to prevent any large scale importation. It also recommended retention of the supplementary administrative procedure of sections 27 and 28, the repeal of s 28(2) (requiring notice of intention to import), the repeal of s 28(3)(d) (permitting importation of any book lawfully printed in any country which has adhered to the Convention and the Additional Protocol), and the repeal of s 28(4).

In making these recommendations, the industry presented certain views which warrant consideration. It was stated that an important reason for retaining s 27 was that it at least enables the owner of the Canadian copyright to secure a conviction under the Customs Tariff Act, without having to provide knowledge on the part of the defendant; the inclusion of the work in Schedule C is considered notice to the defendant who is thereby deemed to know that he cannot import the work.

It was pointed out that most, if not all, jurisdictions have import restrictions similar to s 27. Section 27 of the Canadian Act is copied from the 1911 UK Act, and the new UK Act of 1956 contains a similar provision.<sup>3</sup> If Canadian authors and publishers were not provided with similar rights, they would compete under an extreme disability, particularly against their UK and USA counterparts.

It was further noted by the industry that s 28(2) is merely a necessary adjunct of compulsory licensing and it was recommended that the latter be abolished. In addition, the section seems

1. Ilsley Report, op cit, pp 51-52, (emphasis added).

2. idem, pp 92-93

3. But it is limited to printed copies of published literary, dramatic and musical works.

to render simultaneous publishing and co-publishing impossible in many cases, by prohibiting the importation of copies of any book in which copyright subsists until 14 days after publication; s 3(4) provides that a work shall be deemed to be published simultaneously in two places, if the time between the publication in one such place and the other place does not exceed 14 days.<sup>1</sup>

If s 28(2) were removed, s 28(3)(d) would no longer be necessary, nor would s 28(4) since the section must apply to works published in any country.

Other views were that there should be a sincere attempt to restrict the right to import "pirated" and other infringing works from abroad and that any importation should be prohibited where the same works are lawfully available in Canadian editions at the time they are ordered. Indeed, in the case of co-publication by Canadian and foreign interests, it was argued it was not fair to permit importation of copies of an edition published and available in Canada.

However, outside the publishing industry, a different view was expressed that, to help keep Canadian prices for published materials as low as possible, it should be possible to import copies of any work where they have been produced abroad by the copyright owner or under his authority.

#### 6. Conclusion

The Economic Council took the position that the Copyright Act should not be used as an import-restricting device. However, while prior to 1953 and "the Varcoe ruling", the Act was used by agents as a means of restricting importation, it has not been so used since then. Hence, the existing law, as it has been implemented, has conformed to the Council's view.

In light of publishing industry complaints about the practice of "buying around", the deterrent effect of the present provision on major book buyers in Canada would appear to be minimal. Presently, the "threat"<sup>2</sup> of invoking s 27 is an empty one; the Varcoe interpretation (extending the importation bar to publishers and sales representatives in Canada) imports an effect the industry would prefer to avoid.

If the Act were to be amended as suggested by the industry, then not only would the problems of "buying around" and remaindering be solved but exclusivity of distributorship would be assured; the industry would hold absolute monopolies.

On the other hand, importation provisions are a means of carrying out the objectives of copyright: to protect the exclusive rights of authors to assign and licence their copyright, and to permit thereby

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1. The object of section 28(2) is to prevent a work of a non-Convention author from achieving Convention copyright protection by being simultaneously published in Canada (s 3(4)).
  2. Economic Council Report, op cit, p 154.

the conduct of business with relative certainty. It is noted that the Royal Commission on Book Publishing (Ont.) recommended the following:

If Canadian publishing is to find an international market, it must become involved in co-publishing on an ever-expanding scale. This will involve the buying and selling of territorial rights, which are the life-blood of international publishing. For the reasons set forth in Chapter 3, we recommend that no revision be made in the Copyright Act which would further restrict the ability of Canadian publishers to buy, sell, and licence territorial rights, and to protect the copyright in the regional editions which such international publishing arrangements thus make possible. Specifically, no revision of the Copyright Act should have the effect of making lawful the importation into Canada of copies of copyright works where copies of an edition specially printed or bound for sale in Canada with the permission of the copyright owner are available in this country.<sup>1</sup>

In general, the problems of "buying around" and dumping are not considered copyright problems, and the Copyright Act is not the proper vehicle for solving these particular problems. If, on the other hand, Canadian agents did own the copyright in the foreign works they distribute and sell, the remedies of the Act would be available to them. If it is considered desirable to further assist the publishing industry, such assistance should be provided by means other than copyright law.

It is proposed that the rights presently provided in Canadian law be maintained. An author should be able to take action with respect to the importation of, and dealing with, infringing material, but without using the customs facilities to enforce his private rights.

*RECOMMENDATIONS:*

1. That section 17(4), prohibiting the importation of infringing copies of any work, be retained but amended to provide exceptions for individuals importing for private use, and for institutions, as designated in the Ilsley Report.
2. That sections 27 and 28 be repealed.

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1. Canadian Publishers and Canadian Publishing; op cit,  
p 275.

Part IV

Part IV is primarily concerned with the administration of copyright policy as might be reflected in a new Copyright Act.

Part IV questions the value of the present optional registration system; recommendations are made for its abolition. The Part then discusses the possibility of further collective exercise of copyright, which is encouraged as a means of accommodating the interests of authors and users. The extent of the control and regulation of collective mechanisms is also discussed; such control and regulation is necessary to protect the public interest by ensuring equity between owners and users. The formation of a regulatory body, a Copyright Tribunal, is proposed.

Canada's accession to international conventions, other than those of which Canada is presently a member, is examined, followed by a consideration of Crown copyright and the proprietary interests of the Crown.

The necessity for more efficient and suitable means of extending the Act to countries with which Canada has copyright relations, and the requirement for precise transitional provisions, are reviewed.

Finally, the desirability of the periodic review and revision of the Act is discussed, as is the necessity of establishing an on-going mechanism for consultation.

#### A REGISTRATION OF COPYRIGHT

Section 36 and the sections that follow now enable anyone with an interest in a protected work to register copyright in that work, and to register any grant therein made by assignment or licence. Registration is effected by filing the appropriate forms with the Copyright Office and paying the required fees. Registration is optional and copyright is not forfeited by failure to register.

Every register maintained by the Copyright Office is "evidence of the particulars entered therein" (s 36(1)) and is admissible in court without further proof. A certificate of registration is evidence that copyright subsists in the work and that the registrant is the owner of the copyright therein, (s 36(2)).

The Economic Council expressed the following views on registration:

Today, with communications and other information technology greatly improved and with governments more continuously in touch with each other on copyright matters, formal national and international registration of copyright in works could be carried through much more quickly, cheaply and certainly. The United States, it may be noted, already has a national copyright registration system. The advantages of general compulsory registration, which if the system were well-designed would be primarily those of more rapid identification of owners and securing of rights, now appear to exceed the disadvantages. Canada should press for an examination of the possibility of instituting such a system on a multicountry basis under the international Conventions and should be prepared to set an example

in her own domestic system if this would be likely to expedite matters. In terms of real social costs, a good registration scheme should be able to reduce the total amount of resources being expended, largely by private parties, on copyright search and on copyright lawsuits. These costs, which may otherwise tend to grow considerably larger in the future, can be reduced if there is a readily available source of the relevant copyright information.<sup>1</sup>

It is clear that, through a registration system, the Council sought to solve problems associated with identifying the ownership of copyright and reducing litigation and search costs. The questions then are: Should the present registration system be retained? Should a compulsory copyright registration system be instituted on a national and international scale? To what extent could the costs of ascertaining ownership of copyright and instigating law suits be reduced by such a system?

#### 1. The Present System

Copyright registration in Canada is optional, but there may be distinct disadvantages for the owner in not registering. For example, registration overcomes the defence of s 22 by which, if a defendant proves he had no reason to suspect that copyright subsisted in the work, the plaintiff is only entitled to an injunction. Further, by virtue of s 40(3), unless it is registered, an assignment of copyright is void against any subsequent bona fide assignee who has himself registered his assignment. Finally, under s 48, performing right societies are required to file the lists of works they administer, failing which it appears they may not be entitled to collect royalties.

Ownership of copyright in individual works is not a simple matter to ascertain, particularly where a search involves a large number of transactions over a period of many years. Presently, registration is based on a declaration by the applicant who must provide only limited information. Furthermore, there are no provisions for any public notification of an application and the Registrar must rely on the statements made in the application. The Registrar does not examine the work in which copyright is claimed; in fact, the Registrar does not even examine the veracity of the applicant's declaration. Finally, since registration is voluntary, not all copyrights are registered and, even where they are, subsequent assignments are not necessarily documented. Hence, the present register, as an accurate record of ownership, is of doubtful value.

Moreover, the registration provisions of the present Act conflict with the international conventions. Article 2 of the 1886 Berne Convention made the protection of copyright contingent upon compliance with the conditions and formalities prescribed by the legislation of the country of origin of the work. That provision was abolished in 1908, since which time the enjoyment and exercise of rights have not been subject to any formality and are even independent of protection in the country of origin of the work. By limiting the extent of remedies available where a copyright has not been registered, s 22 of the Canadian Act appears to conflict with the "no-formalities" requirement of the Berne Convention".<sup>2</sup>

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1. Economic Council Report, op cit, p 149.

2. Article 4(2) of the Rome Text of the Convention provides that "the enjoyment and the exercise of the rights shall not be subject to any formality; and such enjoyment and exercise are independent of the existence of protection in the country of origin of the work". Later revisions have maintained this provision.

Similarly, the formalities required under s 40 and s 48 do not accord with the Convention as they affect the "enjoyment" of the copyright. Nor does registration as prima facie evidence of copyright accord with Article 15 of the Berne Convention which provides that, in the absence of proof to the contrary, an author is presumed to be the person whose name appears on the work. If Canada is to honour its commitment, discrepancies should be removed from the Act to reflect the Berne provisions.

Article 3(1) of the UCC provides that a contracting state which, under its domestic law, imposes requirements of deposit, registration, notice, manufacture, etc., shall regard the requirements as satisfied with respect to works protected by the Convention, and first published outside the state's territory (of which the author is not a national) if the UCC notice is placed on all copies of the work from the time of first publication.

It will be recalled that the UCC is a "national treatment" convention but, if each state were to impose different formalities upon foreign works, one of the prime aims of the UCC - simplification of the machinery for obtaining international protection - would be challenged. Each author would have to find, interpret and comply with the laws of each of the contracting states - virtually an impossible task.

Effectively, Canadian law is in apparent conflict with the Berne Convention in so far as registration requirements are concerned. Would the Courts consider the Canadian requirements satisfied by a proper UCC notice; for instance the Canadian requirement of registering in order to obtain damages as a remedy? It is submitted that the requirements of a compulsory registration system, if introduced, would have to be considered satisfied by the notice, if Canada were to remain in the UCC.

The IIsley Commission noted the Conventions' provisions and stated that, if making the enforceability of copyright dependent on registration offended the conventions, it would not be possible to so provide. However, it was the Commission's opinion that "such a provision would not offend against either Convention".<sup>1</sup>

On the other hand, the Commission considered it anomalous in obtaining registration that "a mere statement by a prospective plaintiff should be sufficient"<sup>2</sup> to prove the existence and ownership of copyright. The Commission noted that s 22 provides that if the copyright was registered at the time of infringement, the defendant cannot plead he was not aware of the existence of copyright. The Commission objected to a provision where the "production of a registration certificate shifts the burden of proof to a defendant in an infringement action".<sup>3</sup> The Commission did not, however, consider the more curious anomaly where, in an action for infringement, the plaintiff holder of a registration certificate would still be required to prove that the work identified in the certificate was, in fact, the very work in respect of which the action was brought.

1. Ilsley Report, op cit, p 36.

2. idem, p 37

3. ibidem

The IIsley Commission finally recommended repeal of all the registration provisions. Particularly, the Commission recommended that the register be abolished on the grounds that it should not be maintained "merely for the purpose of making it impossible for a defendant in an infringement action to prove that he had no reasonable ground for suspecting or believing that copyright subsisted in a work".<sup>1</sup> The Report did consider that registration of assignments would be helpful, but saw this registration as expensive and "of doubtful consistency with one or both of the Conventions".<sup>2</sup> Consequently, the Commission recommended that the present provisions for registration of assignments be repealed.

## 2. Other Jurisdictions

There are very few countries which require compliance with formalities as a condition precedent to protection.

In 1911, the U.K. changed its law to accord with the Berne provision that the enjoyment of copyright must be without formality. The Committee considering the matter noted: "On general principles there seems to be no reason why owners of copyright would be required to comply with formalities which are not imposed in most cases of ownership of personal property".<sup>3</sup>

The Gregory Committee, in its consideration of formalities, emphasized the Berne provisions and came to the conclusion "that any hardship which copyright owners may suffer under the present provisions is a further example of what they must reasonably accept in return for the very considerable benefits of securing copyright protection without formality or fee".<sup>4</sup>

In the USA, the present 1909 law, stated briefly, requires a work to be published with a notice of copyright in order to obtain statutory copyright in a published work. As a condition precedent to any infringement action, the claimant must "promptly" apply for registration of copyright and deposit copies of the best edition of the work. A certificate of registration, if issued, constitutes prima facie evidence of ownership. Assignments and grants of copyright have to be recorded. It is noteworthy that the system does not make registration a condition of obtaining copyright.

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1. IIsley Report, op cit, p 38. However, it has been held that a plaintiff cannot rely on s 36(2) to "discharge the onus which s 20(3) lays on him merely by filing a certificate of registration of copyright in his name" and "where the plaintiff is not the author ... and the defendant puts in issue the plaintiff's title ... the onus of proof of the contrary of the presumption that the author of the work is the owner ... rests on the plaintiff"; Circle Film Enterprises Inc v Canadian Broadcasting Corporation, (1957) 88 CPR 1 (Ex Ct) at pp 9-10.

2. idem

3. CMD 4976 - p 12

4. Gregory Report, op cit, paragraph 286.

In the new US law, effective January 1st, 1978, the owner is required to deposit copies of a published work within 3 months of publication. Again, such deposit is not a condition of protection; registration is permissive and may be effected at any time during term for any published or unpublished work. The Registerl determines if the material deposited "constitutes copyrightable subject matter" and, if so, issues a certificate.

### 3. Compulsory Registration

If compulsory registration were to be adopted, two systems would have to be developed: first, a national system for each member country of the Berne Convention on the one hand and of the U.C.C. on the other hand; second, an international system which would undoubtedly require a central agency for the filing of national registrations. Indeed, international notification to each affected country would be essential, if only for the determination of date of first registration.

The compulsory system envisaged by the Economic Council carries with it the assumption that registration would be a condition of securing copyright.

The provisions of the Berne Convention allow for no formalities, and as the UCC provides that any required formalities are met by the use of the "UCC notice", the introduction of a formal national and international system would conflict with the Berne Convention and with the "solution" contained in the UCC. It is therefore not likely that proposals to introduce international registration would find acceptance at the international level.

Moreover, for Canada, such a system carries with it deposit requirements, as the certificate of registration would have to be the proof of the existence of a protected work and ownership therein. The Registrar would have to be satisfied with regard to what is being registered. Deposits and their administration, cataloguing, indexing and storage would enormously increase the money required to operate a copyright registration system.

An interesting problem, attendant upon the introduction for Canadians of a compulsory national registration system as a condition precedent of protection is that Canadian authors could publish their works in another Union country and then claim convention protection in Canada, thus defeating the system. This would have drastic effects on the Canadian publishing industry. For this reason, there was strong reaction by the private sector against the imposition of such a system.

While it may be possible under the conventions to introduce a national compulsory registration system, any move toward an international system would meet with failure. Insistence on compulsory registration of foreign copyrights would mean, in effect, a complete disregard of convention commitments.

### 4. Conclusion

Those in favour of retaining the present voluntary registration system stressed that it provides a "necessary" presumption of law, enabling

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1. In the USA, the title "Register of Copyright" is the equivalent of the Canadian title "Registrar".

them to enforce their rights. If the present system were to be eliminated, they say the presumptions would have to be changed to weigh more heavily in favour of the copyright owner, particularly with respect to proof of ownership. They also saw a need to increase, significantly, the range of remedies, particularly with respect to exemplary damages.

The present optional system restricts the enjoyment and exercise of rights and undoubtedly is at variance with the conventions. The information provided by such a system is negligible and, in terms of litigation, inconclusive. Its main advantage appears to lie in the legal convenience for those few interests making use of the system, (primarily the performing rights societies).

It is therefore apparent that a registration system should not be retained if other means can provide the small advantages presently derived from the system. Considering the recommendations already made in this paper with respect to presumptions and remedies,<sup>1</sup> it is submitted that the registration system should be abolished.

#### *RECOMMENDATION:*

*That the present voluntary registration system not be retained in any new Act.*

#### B COLLECTIVES

In Part I, reference was made to the collective exercise of copyright.<sup>2</sup> Certain individual owners of rights may, under the Copyright Act, assign specific rights to an organization. That organization can then exercise and exploit the rights collectively. Such a collective exercise of copyright makes it possible for one organization to represent a large number of creators.

In Part III, references were made, to the need for the collective exercise of copyright with respect to sound recordings,<sup>3</sup> performers,<sup>4</sup> and photocopying.<sup>5</sup>

#### 1. The Present Copyright Collectives

In the present Act, the only mention of the collective exercise of rights is found in provisions that govern the operations of associations known as "performing rights societies", which collectively administer "copyrights of dramatico-musical or musical works or of performing rights therein". This collective representation of copyright interests is not unique in the field of copyright law:

1. See Remedies, p 178, above.

2. See p 15, above.

3. See p 89, above.

4. See p 117, above.

5. See p 162, above.

similar collecting societies in respect of musical works exist in the major countries of the world.

The Economic Council acknowledged that technological developments have created many situations wherein speed of access to information becomes of paramount importance, and felt that copyright laws, by implication, should not be permitted to stand in the way of such access. "Lengthy searches" and "drawn out negotiations" (in ascertaining ownership of material and determining royalty) were mentioned as problems which were becoming increasingly "intolerable".<sup>1</sup>

The Council clearly favoured "regulatory techniques associated with the performing-rights-society approach to copyright".<sup>2</sup> It is apparent that this conclusion was based in part on the Council's view that technology already existed which made possible the billing for use of copyright material as easy as billing for telephone calls. Specifically, the Council made the following comments:

While governments do well to be wary of encouraging combinations of producers that may have anti-competitive effects, continuing technological change appears to make inevitable a greater use in the future of copyright "collectives" such as performing rights societies, which on behalf of their members assess, collect and distribute copyright royalties, and may also detect and prosecute copyright infringement ... we urge the exploration of an improved system for the distribution of certain printed materials that would, among other things, effectively discourage infringement via photo-copier and would employ a collective procedure of royalty assessment.

We therefore recommend here an adjustment of the Copyright Act to permit the wider use of the performing-rights-society approach, including its extension into the field of printed and other materials ... (and) that the powers of the Appeal Board to regulate the fees and royalties of such "collectives" ... must also be enlarged, so that the protection of the public that has necessarily gone along with the formation of performing-rights-societies in the past can be provided.

We should like to make it very clear that the extension of public regulation that we have in mind here would not be such as to force an author or other creative person to yield up his work to any particular processing and

1. Economic Council Report, op cit, p 147. The Council's recommendation for compulsory registration - seen as a partial answer to ownership identification - has been discussed elsewhere, see p 204, above.
2. idem, p 150

distributive system, or to submit to adaptations or mutilations of his work of which he did not approve.<sup>1</sup>

The first important use performed by collectives was in the field of music performing rights societies (PRS) which represented composers. Performing rights societies licence, for a fee, users of music to perform their works (i.e. their repertoire) either by means of broadcasting or by performance in public.

The general functions of a performing rights society (PRS) are:

1. to administer the broadcasting and performing rights in music,<sup>2</sup> which involves the collective of the applicable fees from users. This includes, where the fees are established by regulatory bodies, making submissions and arguing before such bodies;
2. to distribute the royalties received among the member composers, authors and publishers; and
3. to represent the members vis-à-vis governments.

A PRS does not control all music, as there is a wide field of music in the public domain (copyright having expired). There is also certain copyright music, the rights to the performance of which are not vested in any particular performing rights society, either because a composer refuses to join a society, or for some other reason. Within the field of rights held, however, a PRS exercises substantial control. In effect, a single PRS can control the use of music to the extent that it would be almost impossible for promoters of events using music to avoid obtaining a licence from the PRS holding the right. Furthermore, a national PRS rents out its repertoire to other PRS, in other countries, and hence the whole range of world-wide copyright music may be within the control of one particular society in each country.

Composers realized early that if they did not exercise their rights on their own behalf they would lose them by default. This realization led to the formation of performing rights societies. In the early days of such societies, rights were obtained only through proper legal demand and litigation. Generally, it is now accepted that the collectives' rights should be honoured by users of their music. As a result of their vigorous pursuit of the rights assigned to them by their membership, the performing rights societies have become large operations handling ever-increasing sums of money; they have developed sophisticated mechanisms for collecting and distributing royalties.

Performing rights societies are organized internationally by agreements amongst and between the societies, thus creating an effective network of interlocking affiliates which licence to each other their

1. Economic Council Report, op cit, pp 151-152; emphasis added.

2. Usually the "petits droits", i.e. the "non-stage", or "non-dramatic" performance rights, as opposed to the "grands droits" the "stage" or "dramatic" rights. This terminology has no legal status and the rights are generally referred to as the "small" or "grand" rights.

particular repertoires. Each society collects in its own national jurisdiction for its own nationals and for the members of foreign affiliated organizations. The monies collected are transmitted accordingly. The result is that today, the bulk of economic returns to composers are derived from music performed and not, for instance, from the sale of copies of the music.

## 2. The Possibility of Other Collectives

It is to the collective exercise of other "rights" that creators are now turning their attention, and, inevitably, additional societies will spring up to exploit those rights not now collectively exercised.

With regard to photocopying, for example, laws in effect before the introduction of photocopying generally permitted reproduction for a copier's private use. The exclusion for "private use" was based in part upon the rationale that the author was indifferent towards an isolated, occasional and generally low-level use of his work. That rationale became invalid with the advent of multiple high-speed photocopying, the increased private use of tape recorders purchased to build private libraries of musical and literary works, and, more recently, the use of video recorders enabling programs to be recorded directly from television sets for later use.<sup>1</sup>

It is now apparent that creators and owners of copyright should organize to protect their rights and to exploit them in a way that satisfies both their interests and the contemporary needs of society. To accomplish this, it should be possible to build upon the experience of the collective societies already existing and to devise new contractual arrangements adapted to the nature of those rights to be collectively exercised.

In addition to benefitting creators, the formation of collectives could well be in the public interest if for no other reason than to provide speedy and easier access to material. If this is so, however, it should be borne in mind that the role of the government, as is the case with PRS, should be only that of a regulatory agency to ensure that both parties to any arrangement have their interests protected.

Views expressed to the Department have favoured the collective exercise of rights, and supported the Economic Council's recommendations for a performing-rights-societies approach. In terms of photocopying, it has been suggested that the government establish a "clearing house" for the granting of licences and the collection of royalties for reproduction rights. A variation might be to have the "clearing house" mechanism operate independently of the government.

While the views expressed centered upon photocopying and reproduction other suggestions were made. For example, it could be made possible

1. Action has recently been taken in the USA to seek a ban on the sale and use of such machinery: see Universal City Studios Inc. et al v Sony Corporation of America et al.; US District Court, Central District of California. See also "Movie moguls sue Sony" in Ottawa Journal, Nov. 17, 1976, p 46.

to exercise collectively the right to reproduce by any means, including information storage and retrieval system.

During the consultation process, it appeared that general awareness of the concept and possibilities of collectives had increased and a large degree of acceptance was evident. Certain initiatives have already been taken to form collectives, notably in Quebec where a photocopying right society<sup>1</sup> has been formed and is negotiating with educational institutions in the Montreal area. As noted in the section of the paper dealing with photocopying, a similar organization, OCAP,<sup>2</sup> has been created in Ontario.

The Department was also informed that there had been established in Quebec a "Dramatic Rights Society"<sup>3</sup> incorporated under provincial legislation, with the primary purpose of acquiring and licensing the use of "grand rights" in musical and dramatico-musical works.

Other interesting examples include the formation of two other collectives: La Société des Auteurs et Compositeurs comprises members who are composers or authors and is mainly concerned with mechanical recording rights. Similarly, music publishers have formed, at the federal level, Canadian Musical Reproduction Rights Limited, with the objects of:

1. acquiring and holding copyrights; or acting as agents for owners, for the purpose of licensing reproduction rights;
2. collecting and distributing fees; and
3. enforcing and protecting copyright.

An example of yet another collective, this one operating internationally, is the Asian and Pacific Performers Authors and Composers Service (ASPAC). ASPAC, located in Hong Kong, registers, *inter alia*, literary, dramatic and musical works, administers licensing arrangements, and collects and distributes royalties.

It seems inevitable that the trend of exercising copyright through collectives will continue. If so, it is apparent that there will be a need for constant and vigilant regulation of the operations of all collectives. There is nothing in the present Copyright Act to prohibit the formation and operation of organizations to collectively exercise copyright; as a necessary adjunct, a specific agency should be created to regulate such collectives. Indeed, during the consultation process, it was recognized that it would be necessary to revise and expand the role of the present Copyright Appeal Board.

However, one important view put forth by the Economic Council and already mentioned should be stressed: that the regulations should not "force an author or other creative person to yield up his work to any particular processing or distributive system".<sup>4</sup> The Council

Société Canadienne-française pour la protection du droit d'auteur (SCFPDA).

OCAP: Organization of Canadian Authors and Publishers, p 165, above.

Coopérative des Auteurs et des Compositeurs du Québec.

Economic Council Report, op cit, pp 151-152.

continued by expressing the hope that works would place their works in "distributive systems", particularly electronic information systems, "in order to ensure that their advantages to the public of speed and convenience are not largely vitiated by prolonged haggling".<sup>1</sup> Finally, the Council stated that "if serious impediment emerge to the development of socially desirable systems, there should be fall-back provisions for their removal".<sup>2</sup>

To a certain extent, the subject of collectives exemplifies the central theme in copyright of the two major interests which are difficult to balance: the encouragement of intellectual creativity and at the same time the ensuring of the interests of society in having access to and use of copyright material.

Authors and their representatives expressed the view that they do not oppose the development of new technology for using copyright works but that they seek legislative protection for their legitimate interests and guarantees of a fair share of the proceeds when their works are exploited.

It is also thought that collectives can aid in solving the frustration of users who complain of being unable to acquire the required authority to use a work. By making possible the collective exercise of rights, at the practical level, collectives can permit the orderly and regular utilization of works on an equitable basis.

#### *RECOMMENDATIONS:*

1. *That the collective exercise of copyright be encouraged as a means of satisfying the needs of both authors and users.*
2. *That, if any collectives are formed to exercise any right given under a new Act, their regulation, control and review be the responsibility of the appropriate government agency designated.*

### C THE COPYRIGHT TRIBUNAL

In the previous section, the possibility of an increase in the collective exercise of copyright was explored and discussed. It was then recommended that the regulation, control and review of collectives should be the responsibility of an appropriate government agency. It is now proposed to discuss the nature of existing and possible future collectives, in relation to the function, scope and responsibilities of a regulating mechanism.

#### 1. Present Collectives in Canada

Authors' societies are essentially trustees, or trustee organizations administering the property of others. It is obvious that an individual author cannot possibly control all the uses to which his works ar

1. Economic Council Report, op cit, p 152.
2. idem. It should be noted that the Council attached no such proviso to its recommendation on compulsory licensing.

ut and it would be impossible for him individually to exercise his rights. It is therefore appropriate that authors, where feasible, become members of societies which in turn will protect their members' interests.

thus, with respect to performing rights in music, it is accepted that collective action, through entrusting societies with the authority to grant licences to users, is desirable. If such societies were considered monopolistic, certain interests would advocate breaking up such entities. The result, of course, would be a multiplicity of societies, each controlling performing rights in some works. Users would be required to read lists (if available) of the works each society controlled to determine whether or not they held the appropriate licence. The task of overseeing such societies would be costly and the cost to the consumer would rise. For these reasons a multiplicity of societies administering identical rights should not be encouraged, but rather, potentially monopolistic societies should be controlled and regulated.

Canada early recognized a need for regulation of these societies and broke new ground in 1936 when it amended its Copyright Act to establish a Copyright Appeal Board for the purpose of controlling the collective exercise of the performing rights in music.

Sections 48 to 50 inclusive of the Canadian Copyright Act provide for the control of organizations granting licences to perform "dramatico-musical or musical works". Each such entity is required to file with the Minister lists of all current works in use in respect of which they have acquired and exercise the copyright. Prospective tariffs must be filed for ensuing calendar years with the Copyright Appeal Board which may, after consideration, vary or approve the proposed tariffs.

Canadian societies acquire, by assignment, the composer's right to perform his musical work in public, including the communication of the work by radio, and performance by means of "any mechanical instrument". In this manner the societies protect and enforce the right.

#### . Other jurisdictions

In the UK, it was accepted unreservedly that collectives provide the only reasonable way in which composers can enforce their rights, but the Gregory Committee noted the desirability of controlling such societies and, referring in detail to the Canadian law already enacted, stated that it embodied a "principle which we consider should also be recognized in this country".<sup>1</sup> In referring to certain undesirable results of the operations of such societies in England, the Committee said:

- (a) they have established tariffs of fees, varying between classes of users, and applicable without appeal;
- (b) the classifications of rates of fees in force have been changed from time to time on short notice, and in an arbitrary manner;

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<sup>1</sup> Gregory Report, op cit, p 76.

- (c) the tariffs cover the whole range of performances in public in the widest sense of the term, which means that the conditions of the licences have to be observed and the fees paid on a wide range of performances which many would not regard as taking place in public.<sup>1</sup>

The criticism came about because of lack of regulation, there not being in the UK a body equivalent to the Canadian Copyright Appeal Board. Following that criticism, the UK 1956 Act established a Performing Right Tribunal under s 23 to determine disputes "between licensing bodies and persons requiring licences", but only with respect to three types of rights:

1. that of authors and composers of musical works;
2. that of the maker of gramophone records in their sound recordings; and
3. that of broadcasting organizations which are given the power to control the public performance of their TV broadcasts.

In the USA, ASCAP (American Society of Composers, Authors and Publishers) was created in 1914 to enforce a statutory right to perform musical compositions in public and for profit. Another society, BMI (Broadcast Music Inc.), entered the field in 1939. There is also another smaller society, SESAC, which was formed in 1930. No provisions for regulation of these societies, other than through the operation of normal antitrust legislation, was introduced. The new US law, while providing for the establishment of a Copyright Royalty Tribunal, has not given it a role identical to the Canadian Copyright Appeal Board; however, the US Tribunal may determine and adjust specified rates, and distribute money received in respect of cable use, performances of sound recordings, compulsory mechanical recording, and performances by means of juke-boxes.

At present, the majority of countries subject collectives to direct control either by specific copyright provisions or by legislation outside copyright law. An interesting example is the German law of 1956 which provides for regulation and control in considerable detail: filing of authorizations, articles of association and declarations; rights and duties (i.e. administration, income distribution, provision of welfare and assistance facilities, accountability and inspection); setting of tariffs (disputes controlled by an arbitration commission); role of supervising authorities.

### 3. The Tribunal

The Economic Council's position on collectives has been reviewed earlier,<sup>2</sup> and it is not proposed to repeat the discussion here. However, it should be stressed that, in considering collective assertion of rights, the Council said:

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1. Gregory Report, op cit, p 156.
  2. See Collectives, p 209, above.

... the increased use that we foresee of compulsory licensing and other regulatory techniques associated with the performing-rights-society approach to copyright enforcement will render more important the regulatory and arbitrating duties of the present Copyright Appeal Board.<sup>1</sup> We recommend that the functions of this Board be absorbed into those of the more broadly based Appeal Board<sup>2</sup> for all matters of intellectual and industrial property ...

We recommend that the Appeal Board survey, from time to time, the statistical and other techniques of royalty assessment being used by performing-rights-societies and similar "copyright collectives" operating under its jurisdiction. It is important that the techniques used be fair to all members of such collectives, at least to the extent that this can be assured without incurring intolerable costs of monitoring and assessment.<sup>3</sup>

A similar position has been adopted throughout this Paper. Various recommendations have been made concerning particular matters, which have included assigning to the Copyright Tribunal, or envisaging as part of the Tribunal's responsibility, certain duties and functions. The necessity of striking a balance between those wishing increased protection and those desirous of having increased, and perhaps free access to copyright material, exemplifies the need for such a Tribunal to act as a mechanism to ensure the protection of everyone's rights within the public interest.

However, should it not be possible through collective means to meet the needs of creators as well as the need for orderly access to copyright works, or should it not be possible for the Tribunal to insure that royalties accruing to collectives (or other organizations supervised by the Tribunal) are equitably distributed, the function of the Tribunal would, of course, be considerably reduced.

If such were the case, the present difficulties, which it was thought that collectives could solve, would remain, and no one's needs would be met. Moreover, the granting of rights which, generally, could be exercised only through voluntary collective action would not be productive.<sup>4</sup> While it might be possible in such an event to consider the introduction of compulsory licensing to remedy the situation, the possibility has not been explored in this Paper.

- Which, in practice, approves tariffs of fees or charges which may be collected by performing right societies from various classes of users.
- Recommended in the Economic Council Report, op cit, p 93.
- idem, pp 150-151
- i.e.: performing right in sound recording; performances by performers; reproduction by photocopying.

If the objectives of the recommendations as made are to be reached, the creation of a Tribunal will be necessary to establish and maintain the proper balance between owners and users of copyright material. With respect to the functions and responsibilities of such a Tribunal, the Paper has already identified the following needs:

1. setting and revising royalty rates for mechanical recording rights;
2. fixing the appropriate fees payable by cable systems for rediffusion; establishing rules for the assessment, collection and distribution of royalties;
3. regulating and controlling collectives: in general those organizations seeking to exercise collectively any of the rights provided in a new Copyright Act.

Such a wide range of responsibilities call for an examination of each aspect separately. However, the development of the necessary detailed considerations and recommendations, according to the nature of the subject matter and the special requirements of each, will only be possible following reaction to the general recommendations made in this Paper. What follows, therefore, is only a general exploration for the purposes of stimulating public reaction.

#### (a) Mechanical recording royalty rates

Given that the compulsory licensing system for the mechanical reproduction of musical works is to be retained, an important issue is the establishment of a royalty rate. The rate-setting and revising authority granted to the Tribunal would be a new departure for Canada.

The particular recommendation<sup>1</sup> envisages setting a royalty rate as a percentage of the retail selling price. It is suggested that a certain lead time should be given for the establishment of the first percentage rate, to enable all affected interests to make submissions and representations to the Tribunal. Based upon those representations, the Tribunal would set the first rate. It is submitted, moreover, that, in the interests of certainty, the Tribunal should set a rate valid for a fixed period of years during which time the rate could not be changed. After the expiration of the fixed period of time, the Tribunal might set a new rate, at its discretion, based upon its own investigation and upon any submissions made to it.

#### (b) Collectives in general

Technological development has been cited as a major rationale for the collective exercise of copyright. While technology has made it possible to infringe copyright with relative ease, it is recognized that it is primarily incumbent upon creators and owners of copyright interests to organize themselves in order to protect

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1. See Compulsory Licences for the Mechanical Reproduction of Musical Works on Sound Recordings, p 103, above.

and exploit their rights and hence satisfy their needs and the demands of society. To accomplish this, authors and owners should be prepared to take the initiative in forming the necessary mechanisms to collectively exercise those rights granted by any new Act. It follows, of course, that the formation of collectives would be in the public interest in that it would provide regular and easy access to copyright works.

The role of the government, as is the case with PRS, should be to ensure that both parties to any licensing arrangement have their interests protected. In the present Act, no specific provisions for regulation are made with respect to collectives other than PRS, and they may now be formed free of regulation and control.

In the section on collectives<sup>1</sup> it was noted that initiatives have been taken to form such societies, notably those related to photocopying, mechanical recording rights, and the administration of "grand rights". Also, a general trend towards collective activism, is evidenced by the formation of the Writers' Union and of various organizations in Quebec to represent authors vis-à-vis publishers.

While the collective exercise of any particular right would undoubtedly make it easier for users of copyright material to obtain the necessary authorization, it must be recognized that any collective exercise of a right almost inevitably introduces an element of imbalance in negotiations. It therefore follows that this balance must be restored by a controlling mechanism such as the proposed Tribunal.

When the Copyright Appeal Board was established in Canada, it was not introduced to regulate the right to perform in public; rather, it was set up to regulate the collective assertion of that right. It is this principle which must be retained. Where new collectives are formed, they too should be subject to similar regulation and control by a Tribunal.

#### (c) Performing rights societies

The primary function of the present Copyright Appeal Board vis-à-vis performing rights societies is to determine the tariffs that are to be charged to music users by the societies. It is settled that the users of copyright music are to pay fees to the performing rights societies. Only the amount of compensation is in question. This question in turn breaks down into two components: how much should be paid by each user; and, how is the amount paid by each user to be divided between the two societies in Canada - CAPAC and BMIC.

The present Act requires each society to file with the Minister lists of its current repertoire in respect of which it proposes to charge tariffs. Each society must also file, on or before the first day of November in each year, statements of the tariffs it proposed to collect during the next calendar year in consideration of the issue or grant of licence for performance of its repertoire in Canada.

The Copyright Appeal Board holds public hearings with regard to every tariff to which there is an objection; anyone may be heard. The Board does not give reasons for its decisions, which are

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1. See p 213, above.

usually reserved, and there is no appeal from its decisions. The Board makes its own rules and provisions respecting its sittings, the manner in which it deals with matters and, therefore, the carrying out of its work.

The Board is in reality a rate-fixing board which has to establish a tariff, the reasons for which are impossible to arrive at with any great degree of accuracy. In practice, the performing rights societies negotiate with the major music users, such as broadcasters but the Board does not consider itself bound by any such agreement. Nevertheless, negotiated agreements have been accepted by the Board as a basis for the fixing of tariffs. Moreover, the Board does not consider itself bound by previous decisions or previous tariffs, particularly as a base for establishing new tariffs which may represent an increase in previous tariffs. In essence, the Board starts afresh with each application for approval of a tariff.

In addition to arriving at a decision which will reflect an equitable fee for the use of music material, the Board must also decide how to apportion the available money between the two societies. The variables that must be taken into account include the relative proportion of music repertoire that is used. This would appear, on the basis of logic, to entitle the society whose music is used to a greater extent to a larger share of the performing right dollar.

In order to facilitate this particular task, it is suggested that the Tribunal should be given certain powers to enable it to obtain information from the collectives. Such powers would, of course, depend on the final responsibilities assigned to the proposed new Tribunal. For the purposes of this section, it seems unnecessary to expand upon the subject, except to note that such powers might be needed by the new Tribunal.

It also became apparent during the consultation process that greater flexibility was needed in the Copyright Appeal Board's procedures. Such flexibility is presently limited. By way of example, it is probable that performing rights societies would prefer to file their tariffs on a date other than November 1st as presently required under the Act. Considering the late date on which the Board presently receives the proposed tariffs of CAPAC and BMIC, a time-lag exists between the date of approval and the Minister's requirement to publish the tariffs in the Canada Gazette. In fact, due to time constraints, the new tariffs are usually published well into the following year. The efficient operation of the performing rights societies is thus hampered for at least two or three months of every year. While the tariffs for the preceding year will no longer be applicable, the settled tariffs for the current year will not yet have been published.

This situation illustrates the problems which occur when what should be flexible regulatory powers are made the subject of rigid statutory provisions. Such situations could easily be remedied in the drafting of a new Copyright Act.

More importantly, however, attention should be given to the precise substantial powers (as opposed to procedural powers) to be granted to the new Tribunal. By virtue of s 48 of the present Copyright Act, the responsibility of the Board appears to be limited to the approval of "statements of fees, charges or royalties" proposed by the performing rights societies. This phrase has been the subject of judicial examination and has been interpreted as allowing the Board, for example, to

impose reasonable conditions upon those who desired to take advantage of an annual licence where the tariff was based some way or other on income, gross revenue, or in any way other than a fixed dollar amount. The provision (...) authorizing the inspection of a licensee's books and records seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to the plaintiff.<sup>1</sup>

The jurisprudence dealing with the Copyright Appeal Board's responsibilities will not be reviewed here. It should be stressed, however, that, in the drafting of any new Copyright Act, care should be taken to ensure that the Tribunal will indeed be granted the powers it needs to fulfill its duty in an efficient manner. At the same time, the essential duty of the Tribunal should remain that of fixing the amount of royalties that performing rights societies may collect. The powers of the Tribunal to impose conditions on the collection of royalties by performing rights societies should not be confused with the Tribunal's central responsibility: to ensure an equitable balance between creator and user with appropriate safeguards in the public interest.

#### (d) General Aspects

It is not possible to forecast the number of other collectives that might be formed and the problems that may be associated with their operation. In particular, the appropriate level of fees payable by licensed users can only be established after experience has been gained in the field by the collectives, the users, and the Tribunal. With respect to PRS, the present Board approves tariffs in advance of the year in which the tariffs are to be collected. Those tariffs are usually based on past experience and negotiation with major users, prior to the filing of proposed tariffs by the PRS with the Board.

However, the Tribunal will not be able to benefit from prior experience in new licensing situations and it may not be possible to apply to other collectives the procedure presently followed with respect to PRS.

Possibly, in those cases where prior agreement is reached between the parties, the Tribunal could approve contracts or agreements after the fact, until sufficient experience and data has been accumulated from which generalizations can be made. Of course, criteria that the Tribunal deems relevant and appropriate would be applied. It is also possible that some users will resist being approached for a licence. The Tribunal would, therefore, hear disputes that occur between those who seek to licence and those who are being licensed. In any event, the arbitrary changing of rates and fees by collectives, particularly without notice, should be disallowed. Provision should be made for appeal to the Tribunal on these matters.

Similarly, situations should be avoided where restrictions are placed upon use which would prevent the reasonable and effective use of the copyright material, even though fees are paid. Presently, by virtue of s 50(10), a PRS has no right of action or enforcement for infringement against any person who has tendered or paid the appropriate fee, as approved by the Copyright Appeal Board. A recommendation qualifying this provision has been made.<sup>2</sup>

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<sup>1</sup> CAPAC v Maple Leaf Broadcasting Co. Ltd; (1953) Ex. C.R. 130; affirmed (1953) S.C.R. 624.

<sup>2</sup> See p 194, above.

The extent to which a similar provision should operate with respect to other collectives remains to be determined.

As stated, in the present Act, each collective formed must file list of the current works in respect of which it has authority to issue licences to perform works.<sup>1</sup> The fees such collectives propose to charge for the ensuing year are also subject to prior approval by the Copyright Appeal Board. The Copyright Appeal Board has the power, in fact, to deny the collective exercise of copyright. However, with respect to collectives where it is not possible to obtain prior approval of tariffs, such collectives should at least give notice to the Tribunal of their formation and their intent to operate. To ensure this, it could be provided that such collectives do not have a right of action against possible users unless and until they give notice of their existence to the Tribunal. At least, the Tribunal would be aware of the formation of the collective and would be put on notice that it will later have to exercise its authority with respect to the licences granted by such a collective.

#### (e) Other powers

The Tribunal will have to be given appropriate discretionary powers if it is to function efficiently. The scope of this discretion will depend, to a great extent, on the nature and scope of the powers granted. In particular, however, it is emphasized that the Tribunal prime responsibility is to maintain an equitable balance and, in certain instances, to ensure that the royalties generated by the system are distributed equitably.

Finally, the substantive powers of the Tribunal will have to be determined prior to settling procedural matters and deciding whether the latter are to be incorporated in a new Act or to be prescribed by regulation: for example, the extent to which the Tribunal may acquire information and compel the submission of information.

#### *RECOMMENDATIONS:*

1. *That a Copyright Tribunal be created to replace the present Copyright Appeal Board.*
2. *That the Copyright Tribunal, in addition to the responsibilities already imposed on the Copyright Appeal Board, be responsible for:*
  - a) *establishing the rate for mechanical recording royalties;*
  - b) *fixing those fees required to be paid by cable systems for rediffusion, and establishing the rules governing assessment, collection and distribution of such fees;*
  - c) *regulating the collective exercise of copyright with respect to collectives other than Performing Rights Societies: approving licences, and hearing disputes on contracts, licences and changes in royalty rates;*

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1. *If this Paper's recommendation on the abolition of the registration system is adopted (see p 209, above), such a filing requirement would, of course, become anachronistic and should also be abolished.*

3. That there be no right of action by a collective against an alleged user of copyright material unless and until the Tribunal has been notified by the collective of its existence.
4. That the Tribunal be given sufficient discretionary powers to enable it to function properly: to determine and establish its own procedures and the means of exercising its powers; and to ensure that royalties are distributed for the purposes for which they are collected.

#### D CROWN COPYRIGHT

Section 11 of the Copyright Act reads:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in such case shall continue for a period of fifty years from the date of the first publication of the work.

The wording of this provision creates uncertainty. First the section provides a specific exerciseable Crown prerogative, but its extent is undefined. The prerogative copyright is expressed in the opening phrase "without prejudice to any rights or privileges of the Crown". These words imply an overall proprietary right exerciseable at the Crown's discretion at any time and which could prevent use of material covered by the prerogative. In this instance, the term of protection appears to be either perpetual or at whim. A second uncertainty is that, while copyright in published works not covered by the apparent prerogative would have a limited term, copyright protection may well be perpetual where the work remains unpublished. Finally, it is uncertain whether the Crown is, in fact, bound by the Copyright Act. Section 16 of the Interpretation Act<sup>1</sup> provides that the Crown is not bound unless an Act so provides; the Copyright Act does not so provide. This raises a secondary issue: to what extent may the Crown use copyright material of others if it is not bound by the Act?

#### 1. Crown Prerogative

The view expressed to the Department was that the Crown should not be entitled to prerogative copyright, but should be governed by the Copyright Act as any other owner or user.

Section 18 of the UK Act of 1911 provided the substance of the present Canadian s 11. The extent to which Crown copyright was enforced in the UK was set out by Treasury Minutes, which classified Crown publications into categories. The exercise of copyright depended on whether it was desirable that the documents be diffused widely; if so, no steps were to be taken to enforce Crown rights although the rights were not to lapse. It always remained possible to reassert them, if necessary. Thus, protection of Crown rights became a matter of administrative discretion. The UK Act of 1956 retained the prerogative rights

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1. Interpretation Act, RSC 1970, c I-23.

and privileges of the Crown, and expanded protection for a series of classes encompassing literary, dramatic, musical and artistic works, as well as records, films and photographs.

It is not within the purview of this Paper to make recommendations with respect to the privileges of the Crown. However, there may well be arguments in favour of retaining prerogative Crown copyright in certain instances, as was done in the UK.<sup>1</sup> Whatever the basis for retention of the prerogative right, it is suggested that if it is to be retained, its exact scope should be set forth in detail. On the other hand, if the Crown is to be bound by the Copyright Act, the case for retention of prerogative copyright is considerably weakened.

## 2. The Crown's position in relation to the Act

Apart from any prerogative the Crown might wish to retain, the Crown should not be in a different position from anyone else under the Canadian Copyright Act.

If the Crown were not subject to the Act, use of Crown works without specific permission would be impossible, as statutory exemptions, such as fair dealing, only apply to works protected by the Act.

Similarly, the extent to which the Crown can use or "infringe" private copyright would be uncertain, although an English case decided that the prerogative did not include a right to infringe a copyright.<sup>2</sup> The difficulty here is whether the Crown may use copyright material without permission. The Gregory Committee suggested that it was anomalous that there are provisions in UK law for Crown use of patented inventions and registered designs but not copyright material. Indeed the Committee recommended that Crown use of copyright material be permitted, subject to a provision for payment of royalties to be settled by a court.<sup>3</sup> In spite of the recommendation, no such provision was made in the 1956 UK Act.

In Canada, the Ilsley Commission recommended that the Crown not be liable for infringement and, where it does something which otherwise would constitute infringement, that the Crown be liable only for payment of compensation, but not damages for infringement.<sup>4</sup>

It is suggested, however, that, despite the Ilsley Commission and Gregory Committee recommendations, a sufficiently strong case has yet to be made for the Crown to have a preferred position under the Copyright Act. While compensation would undoubtedly be paid under the recommendations, the cost of obtaining compensation in the case of disagreement on the amount to be paid could be the same as that incurred in an infringement action, yet the plaintiff would receive no award of costs or damages for his trouble.

1. e.g. the printing of the King James version of the Bible.
2. Oxford University and Cambridge University v Eyre & Spottiswoode Ltd., (1963) 3 A.U.E.R. 289.
3. Gregory Report, op cit, paragraph 75.
4. Ilsley Report, op cit, p 117.

However, it must be recognized that the Crown is not always an "ordinary user". It is thus reasonable to suggest that, in order to enable Parliament to function with independence, a specific exception should be accorded to the legislative process.

If the Crown is to benefit from the Copyright Act, then doubtless it should also be liable for copyright infringement on the same basis as others. This seems desirable in principle.

### 3. The Crown's Copyright portfolio

The Economic Council recommended an investigation into the relationship between copyright, computers and the federal government, and warned against the possibility of the Crown competing unfairly with rival project developers in the computer field. More generally, the Council was concerned with the possibility that the Crown, by closely controlling copyright, could withhold information.<sup>1</sup>

A view was expressed to the Department that mere publication by the Crown should not operate, as it currently does, to vest in the Crown the copyright in the work published. It was noted that Crown copyright is rarely invoked to exact royalties or prevent use. Regardless of the validity of this view, certain government publications are in fact used for commercial benefit.

Indeed, consultation disclosed that a great many people are interested in reproducing Crown material. If the Crown is no longer to be privileged under the Copyright Act, neither should entrepreneurs be privileged with respect to use of material owned by the Crown.

The exercise of copyright by the Crown is useful to prevent distortion and misuse, and to collect royalties from export sales. Further, the exercise of Crown copyright can facilitate grants of licences permitting private publishers to publish government material, with the assurance that the publishers will enjoy some exclusivity in the publication of that material.

On the other hand, statutes, regulations, proclamations, court and tribunal decisions, orders in council, and state papers, for example, should be excluded from protection and be freely available for use.

It follows that Crown copyright should continue to exist, apart from the operational requirements of agencies such as the National Film Board of Canada and the Canadian Broadcasting Corporation, whose requirements are those of any commercial organization.

Presently, the acquisition and enforcement of Crown copyright does not appear to be the subject of any specific policy or direction, the absence of which, in itself, creates further uncertainty. It is submitted that the Crown should review and determine the extent of its proprietary interests and, more importantly, question the very necessity of acquiring copyright in the first instance.

Following this determination of the Crown's interests, it should be possible to develop a copyright policy and formulate guidelines. It should also be possible to devise policies for the disposal and enforcement of Crown copyright.

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1. Economic Council Report, op cit, pp 174-175.

*RECOMMENDATIONS:*

1. *That the Crown be subject to the Copyright Act.*
2. *That, if the Crown retains prerogative copyright, an exhaustive list of items coming within the prerogative be enumerated in any new Act.*
3. *That a specific exception be provided for parliamentary use of any copyright material in the exercise of legislative functions.*
4. *That the Crown review its interests in the acquisition, control, administration and assertion of copyright.*

**E INTERNATIONAL CONVENTIONS**

In addition to the Berne and UCC copyright conventions, there are several other international conventions in respect of which recommendations should be made. Recommendations are proposed elsewhere as to whether Canada should accede to later Texts of the Berne and Universal Copyright Conventions.<sup>1</sup> The assumption of additional responsibilities in the form of accession to other international arrangements also requires review.

Generally, the copyright conventions have been unable to provide solutions to problems arising from new technology, or, in fact, to meet the demands of those pressing for rights allied to copyright.<sup>2</sup> For instance, the Phonogram Convention arose, in part, from the reluctance of certain countries to adhere to the Neighbouring Rights Convention, and also from the fact that the UCC and Berne copyright conventions do not deal with the protection of sound recordings. Similarly the Satellite Convention deals with problems which neither the copyright conventions, nor the Neighbouring Rights Convention, satisfactorily resolve.

The Conventions in question are as follows:

1. Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonographs (Geneva, 1971). (Phonogram Convention).
2. Convention Relating to the Distribution of Program-carrying Signals Transmitted by Satellite (Brussels, 1974). (Satellite Convention).
3. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961). (Neighbouring Rights Convention).
4. Agreement for the Protection of Type Faces and their International Deposit (Vienna, 1973). (Vienna Agreement).

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1. See p 235, below.

2. For example, at the international level, in varying degrees of consideration, there are suggestions for the international regulation of computers (both programs and data banks), photocopying, translators' rights, protection of folklore, and attempts to solve the problems of cable television and audiovisual cassettes.

## 1. Phonogram Convention

The Phonogram Convention is one of strict reciprocity, signed for the purpose of protecting producers of phonograms against alleged widespread unauthorized reproduction (piracy).

The purpose of the Convention is to provide a minimum of protection against three acts: making, importing, and distributing to the public of unauthorized duplicates of sound recordings. The Convention does not however cover the secondary uses of public performance and broadcasting.

The minimum term of protection is 20 years measured either from the end of the year in which the sounds embodied in the phonogram were first fixed, or from the end of the year in which the phonogram was first published.

The means by which a country may implement the treaty is a matter for domestic law, but includes "one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions".<sup>1</sup>

As of March 1, 1976, there were a total of 19 members of the Convention, including Australia, Germany (FR), France, India, Spain, Sweden, United Kingdom and USA.

The recommendations in this Paper on the scope of protection for sound recordings are compatible with the requirements of the treaty. Canadian accession to the Convention has been urged, particularly in view of the fact that the Convention has now been ratified by the USA. Canadian accession would at least ensure protection of Canadian producers of phonograms in the US without the necessity of obtaining copyright registration in that country.

The protection envisaged in this Paper for sound recordings would be by means of copyright and, of course, would require reciprocity of protection. The extent to which Canada would benefit from accession to the Phonogram Treaty must be therefore weighed against the fact that protection of sound recordings would be extended to members of the Convention on a reciprocal basis. Canadian protection of the recordings of Phonogram Convention countries would be on a quid pro quo basis, rather than on the basis of indiscriminate protection of all recordings of copyright convention countries.

### *RECOMMENDATION:*

*That Canada accede to the Phonogram Convention.*

## 2. Satellite Convention

The Satellite Convention provides protection for program-carrying signals, transmitted by satellites, against the unauthorized

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1. Phonogram Convention, Article 3.

distribution of such signals. The Convention expressly provides that it will not in any way affect international agreements already in force.<sup>1</sup>

Each contracting state undertakes to take "adequate measures" to prevent the distribution within or from its territory of any signal by any distributor for whom the signal, emitted to or passing through the satellite, is not intended. The duration of protection is to be established by domestic law.

It is also left to each contracting state to determine the legal means of implementing the convention obligation, which can be civil, penal, administrative, or any combination of these. Each state has freedom within the framework of civil law and, for instance, may provide for orders to cease and desist, or for damages. Solutions may be reached in the area of copyright, neighbouring rights, or unfair competition.

The Convention deals exclusively with international situations and has no national application. It is concerned only with the distribution of signals, not with fixation or reception. There are certain exceptions with respect to short excerpts of a program consisting of reports of current events, "compatible with fair practice"; all the exceptions are for the benefit of developing countries.

The Convention provides for the possibility of making reservations with respect to the operation of cable systems. Whether or not Canada would be required to make reservations depends on the domestic law respecting cable systems at the time of accession.

It is difficult to assess the costs and benefits of accession by Canada to the Convention. This is particularly so considering the necessity of having to take into account reactions to this Paper's recommendations with respect to cablecasting and allied matters.

Apart from certain difficulties in complying with the procedural requirements of the treaty, the questions and issues arising from the above matters render it premature to come to any recommendation. Therefore, no recommendation is made.

### 3. Neighbouring Rights<sup>2</sup> Convention

The Neighbouring Rights Convention has been discussed in this Paper in so far as performers are concerned, under the heading of performer rights<sup>3</sup>, and has also been discussed with respect to broadcasts,<sup>4</sup> but has not been specifically discussed with respect to the protection of phonograms.

1. By March 31, 1975, the Convention had been signed by 19 states; however, only 2 countries have ratified the Convention and it is therefore not yet in force.
2. The expression "neighbouring rights" means, at the international level, that the scope of these rights embrace three categories: performers, producers of phonograms, and broadcasting organizations as to their broadcasts.
3. p 114, above.
4. p 106, above.

With respect to phonograms, it has been recommended elsewhere in the Paper that they be protected by means of the Copyright Act, to the same extent as they are now protected by the Phonogram Convention. To consider the protection of phonograms under another treaty, the Neighbouring Rights Convention, would therefore be superfluous. Moreover, the recommendations made concerning the protection of broadcasts, recordings, and the rights of performers are centred on Canadian interests. To accede to another convention requiring reciprocity would defeat those objectives.

*RECOMMENDATION:*

*That Canada not accede to the Neighbouring Rights Convention in the absence of any evidence that it would be in Canada's interest to do so.*

#### 4. Vienna Agreement

The Vienna Agreement protects sets of designs of type faces: letters and alphabets, together with accessories and numerals and other associated figurative signs.

The Agreement seeks to ensure the protection of type faces by (a) special national deposit, (b) adopting the deposit provided for in national industrial design laws, or (c) by copyright provisions. The kinds of protection can be cumulative. Each state is required to grant national treatment to those claiming under the Agreement. The term of protection may not be less than 15 years, and may be divided into several periods.

The desirability of accession rests, in part, upon identifying the Canadian interests that would be protected by the Agreement and a comparison of the benefits and costs. Also, the possibility of design protection must be considered in relation to industrial design legislation.

*RECOMMENDATION:*

*That Canada not accede to the Agreement, pending decisions reached with respect to industrial design legislation.*

#### F APPLICATION OF THE PROVISIONS OF THE ACT

Assuming that Canada will remain in the copyright conventions and adopt differential treatment depending on whether the protected subject matter is convention or non-convention material, any new Copyright Act should be extended to those who are entitled to its benefits. These persons are: non-Canadians domiciled or resident in Canada; foreign authors and owners whose works require protection under the conventions to which Canada adheres; and nationals of other countries to which the Act may be extended from time to time.

The present law, according to s 4, applies to works created by British subjects, citizens of a Berne Convention country, or residents within certain locations; and also applies to certain works first published in certain countries or simultaneously published in a Berne Convention country and another country. Section 4(2) enables the Minister

to extend the Act to countries other than members of the Berne Union. Sections 3(4), 3(5) and 3(6) provide further conditions for the qualification of works for protection. Apart from the complexity of s 4, its inadequacy to reflect Canada's responsibilities under the two Conventions has already been discussed.<sup>1</sup>

It is suggested that the present means for extending the Act, i.e. the rigid mechanism set out in s 4, should be replaced. Flexibility should be introduced wherever possible. For instance, fixed references to schedules and conditions which may change should be avoided.

A logical and flexible means to attain this objective might be to extend the protection of the Copyright Act by Orders in Council, as was done in the 1956 UK Act. The Governor in Council, subject, of course, to prior public scrutiny, would then be able to make the necessary Orders for applying any of the provisions of the Act, when they are required.

The recommendations made herein to protect copyright material refer generally only to Canadians. The means recommended here would follow that procedure, by granting Canadians the rights and then extending the rights to others by specific Orders in Council.

To give effect to the responsibilities imposed by the copyright conventions, the suggested method of extension by Order in Council appears even more preferable in light of the fact that the conventions do not require protection of certain material. It could be possible, then, to extend the Act to other countries on a reciprocal basis.

Regarding the provision of reciprocal protection and the denial of copyright to citizens of countries not giving adequate protection to Canadian works, the Ilsley Commission noted that s 35 of the UK Act so provided. Ilsley stated: "This we regard as an important section the substance of which should be enacted in Canada with appropriate alterations to make it apply to Canadian works".<sup>2</sup> It would be reasonable to make provisions for denial of protection, where warranted. Such provisions would exclude from protection material which would otherwise be protected.

Finally, it would be possible by Order in Council to extend the provisions of the Act either generally or specifically, as each situation required. For the purpose of this Paper, it is perhaps sufficient to note the deficiencies of s 4 of the present Act and the desirability of introducing in its place a flexible mechanism that could be adjusted to changing situations.

#### *RECOMMENDATION:*

*That the extension of benefits and rights provided in any new Copyright Act or the provision of any conditions thereunder be accomplished by Order in Council, upon the recommendation of the Minister.*

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1. See pp 43-45, above.

2. Ilsley Report, op cit, p 114.

### TRANSITIONAL PROVISIONS

The present Act contains certain transitional provisions ensuring the continuance of rights or the substitution of new or additional rights. Section 45 provides that no copyright exists at common law or otherwise, nor can it be exercised apart from the provisions of the 1924 Act; section 42 makes specific provisions for transition and the substitution of certain rights granted by the Act for rights existing before the Act came into force; finally, sections 19(9) and 19(10) make provisions of a transitional nature with respect to the mechanical reproduction of sound recordings.

It is not intended to make detailed recommendations with respect to the content of any transitional provisions, as that will be determined in large measure by the substance of any new Act. However, it will certainly be necessary to provide for transitional measures respecting rights in subject matter acquired under the old Act (i.e. the existing law).

For the purposes of this Paper, it is sufficient to note the need for such provisions.

#### RECOMMENDATION:

*That the necessary transitional provisions be incorporated in any new Act.*

### PERIODIC REVISION AND CONSULTATION

Continuing technological change, with its impact on social and economic conditions, makes continuing revision of the law and periodic consultation desirable.

#### Revision

The Economic Council recognized the conflicting views concerning copyright legislation and made certain administrative recommendations. It advocated the formation of a small, high-quality group of experts in economics, technology and law to evaluate the effects of intellectual property law.<sup>1</sup> The Council also recommended setting up a Copyright Advisory Committee to study particular referred issues,<sup>2</sup> and urged a thorough public review of the system at least every ten years.<sup>3</sup>

The practical necessities of the identification, study and assessment of issues will always remain, as will the necessity for consultation, valuation and determination of domestic and international interests. It is worth repeating that participation in international activity is of importance to the development of domestic legislation.

The Council did not elaborate, however, upon the international aspects of copyright and hence it is necessary to reaffirm certain principles. As mentioned, it is necessary for Canada to

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• Economic Council Report, op cit, pp 87-88.

• *idem*, p 150

• *ibidem*, p 220

participate in international work and be represented by experts in the copyright field. Participation provides a means whereby Canada's national interests can be kept under constant review.

It is submitted that Canada should follow the practice of other countries and engage in research on copyright matters, both national and international, as well as consult interested and representative public and private organizations. These activities would better enable Canada to meet its responsibilities, particularly with regard to the passing of legislation to meet the stipulations of the Conventions.

It is of interest to note that, in the USA, even with a recently adopted law, it has been found necessary to create a specific review mechanism. In that country, the need for continuing review is to be met by the establishment of a "National Commission on New Technological Use of Copyrighted Works", the purpose of which is to study and compile data on the reproduction and use of copyrighted works in conjunction with automatic systems and by various forms of machine reproduction, as well as on the creation of new works by the application or intervention of such automatic systems or machine reproduction.<sup>1</sup> A review mechanism of some type should also be provided in Canada.

## 2. Consultation

In Canada, no single professional body exists with which the Department may consult in respect of copyright law. Copyright interests are fragmented and varied and, in most cases, only concerned with matters immediately affecting their interests. These diverging interests are found in both the public and private sectors.

### (a) Public sector

The relationship of copyright policy to the policies and mandates of other departments also requires continuing assessment and coordination. The Economic Council recommended "on other copyright matters affecting more than one department ... arrangements should be made for interdepartmental study and consultative action".<sup>2</sup>

The extent to which copyright relates to the various mandates of other departments and to policies in, for example, communications, broadcasting, cable systems, publishing, record and film industries, as well as the performing arts, should be under constant review.

### (b) Private sector

A large number of interests should be consulted periodically and the process is time-consuming. In so far as preparations for international meetings are concerned, the necessary lead time increases proportionately with the complexity of the subject matter and the number of concerned organizations. The response received from interested parties varies widely in terms of expertise and usually requires further consultation. The establishment of an expert consultative mechanism would be of material assistance.

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1. Public Law 93-573, 93rd Congress, s 3976; Dec. 31, 1974.

2. Economic Council Report, op cit, p 177.

In the UK, a voluntary "Copyright Council" represents copyright interests. The Council presents views to the government regarding legislation and international meetings.

In Canada, certain steps have been taken by elements of the private sector to organize such a copyright council. At the initial stages, such a council could perhaps be concerned more directly with the revision process. The formation and operation of the council would, if it is submitted, reduce the period of time for the enactment of any copyright law. The Government might also be able to use such a council to assist in arriving at solutions of an ongoing nature, as well as assisting in preparation for international meetings.

*RECOMMENDATIONS:*

1. *That continuous evaluation be maintained of the impact of existing and emerging intellectual property systems.*
2. *That provision be made for a means to conduct and maintain a continuing review and study of copyright law and practice, and of technological and other developments in the field, with a view to encouraging the initiation and development of policy recommendations.*
3. *That provision be made for the period revision of copyright law.*
4. *That a mechanism be provided to initiate and conduct regular liaison, consultation and discussion with private and public copyright interests in Canada, and with foreign copyright offices and international organizations.*

CONCLUSION

The recommendations made in Part III and Part IV of this Paper are designed to meet the philosophic considerations set out in Part I, and the economic importance and significance of copyright in Canada, described in Part II.

Inevitably the Paper reflects a basic appreciation of the following facts:

- a) that present Canadian copyright law (apart from minor amendments, and taking cognizance of the activities of performing rights societies) is colonial, being enacted prior to 1931 and as a copy of the English 1911 copyright statute. Further, Canadian participation in the Berne International Convention was directly a result of the activities of the United Kingdom which was responsible for its dominions and colonies; in other words, Canada's position as expressed in its 1924 law was not entirely a reflection of Canadian needs as judged by Canadians;
- b) with the exception of the establishment of the performing rights societies, Canada has been left far behind in providing for its citizens, both creators and users, a modern copyright law. Since 1924, when the present Copyright Act was proclaimed, technological change has been so rapid and radical to make completely out-of-date, or difficult of application, many of its present sections;
- c) that awareness of the economic position of Canada has radically changed in the past 50 years - particularly with respect to Canada being a net-importer of copyright material, resulting in a growing imbalance of international payments;
- d) that the two international copyright conventions lack flexibility to deal with an increasing array of subject matter, as illustrated by the growing incidence of international treaties that deal with subject matter outside the scope of the two copyright conventions: for instance the Neighbouring Rights Convention, the Phonogram Convention, the Vienna Agreement on type faces, and the Satellite Convention;
- e) that the fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions.

It was clear at the outset that Canada might well have, in the early days of the century, not followed the United Kingdom position if that had been possible. The constraints now imposed upon Canada by the Berne Convention have determined our legislation in certain respects, and it is certain that succeeding revisions of that Convention or, indeed, that of the Universal Copyright Convention, do not meet Canadian needs, at least at this stage in Canada's growth.

The authors of the Paper have attempted to develop an appropriate rationale for a revised copyright law for Canada, bearing the above facts in mind. They acknowledge important assistance from the views expressed by the Ilsley Commission, the Report of the Economic Council of Canada and the briefs, submissions and suggestions made to the Department.

Also, each recommendation was made only after close study of the revision of copyright law in other countries, notably France, the United Kingdom, the United States and Australia.

Each recommendation was taken furthermore, having regard to the public interest, and every attempt was made to find an acceptable balance amongst the many conflicting views regarding each item in the bundle of separate rights which, together, makes up the law of copyright. Moreover, the authors were seized of the cultural importance of copyright, together with the significant economic magnitude of the copyright industries and the necessity of providing a basis for their orderly development in Canada.

It was found that, while stressing the paramountcy of creators' rights, the unfettered exercise of copyright on an individual basis, appropriate for an age prior to the communication technology, was no longer entirely appropriate. Accordingly, recommendations were made to enable the collective exercise of copyright, to afford users easier access to copyright material and to creators an easily determined royalty fee. However, no attempt was made to force the collective exercise of copyright, and individuals wishing to remain outside of the system would be permitted to do so.

To provide the necessary balance between owner and user, the establishment of a Copyright Tribunal was urged to control and regulate the collective exercise of copyright. The Tribunal would, it was felt, ensure in part the reaching of the desired equitable balance amongst the many interests affected by the collective exercise of copyright, particularly in respect of the technical complexities of a communications technology.

It was recognized that the public interest in copyright must be broadly construed, as such a concept should encompass the social and economic pressures resulting from technological development, as well as increasing social awareness. The authors of the Paper recognized the increased social consciousness of the importance that copyright plays in the everyday lives of people.

It was considered that the larger public interest was served by recommending, on the one hand, a series of changes which defined more exactly the rights of creators and which ensured the interests of consumers and users, while, on the other hand, recommending against any involvement of the State in the assertion, policing or protection of private rights.

Certain conclusions follows from these and other considerations discussed in the Paper. They are perhaps best formulated as general recommendations:

1. *That Canada remain at the present level of international participation in respect of the Berne Convention and the Universal Copyright Convention.*
2. *That Canada should, however, maintain the present level and extent of protection, taking into account social and cultural developments and, in particular:*
  - a) *opposing forces and views: i.e., to provide greater access to copyright material, yet increase the share of creators and authors in copyright returns and to have regard for the interests of entrepreneurs as well as those of users (consumers) on an equitable basis; and*
  - b) *the need to extend the scope of protection laterally to encompass new subject matter, new use of material, and associated matters.*
3. *That the legal basis of copyright remain that of property.*

Finally, it is repeated that the Working Paper is a document prepared to assist all persons in their understanding of Canadian copyright law and its effect on creator and user. For that reason alone, specific recommendations are made to enable all interested individuals, groups and business enterprises, to focus upon the problems as now seen by the authors of the Paper. Comment and criticism are anticipated and looked forward to, prior to the Minister and the Government proposing solutions for any of the complex problems involved.

Reaction to, and comments on, the Working Paper are invited. Those wishing to write should address their views to:

The Honourable Anthony Abbott  
Minister of Consumer and Corporate Affairs Canada  
Hull, Quebec

or

Dr. David E. Bond  
Assistant Deputy Minister  
Bureau of Intellectual Property  
Consumer and Corporate Affairs  
Canada  
Hull, Quebec

## APPENDIX I

ORGANIZATIONS, INDIVIDUALS, GOVERNMENT DEPARTMENTS  
AND AGENCIES

Since 1969, elements of the private sector have submitted views on copyright revision. Informal consultation was held with those elements wishing to do so. The list below includes all of them.

In May 1974, Consumer and Corporate Affairs also initiated consultation with Federal Government departments and agencies. They are also included in this list.

Agriculture Canada	Canadian Conference of the Arts
Ahead Music Corp. Ltd.	Canadian Consumer Council
Arc Sound Limited	Canadian Copyright Institute
Art Museum Directors Association	Canadian Educational Authors
Association Canadienne des bibliothécaires de langue française	Canadian Education Association
Association of Canadian Television and Radio Artists (ACTRA)	Canadian Film Development Corporation
Benny Louis Band, Toronto	Canadian Government Photo Centre
Broadcast Music Inc. (BMI)	Canadian Government Travel Bureau
Canada Council	Canadian International Development Agency
Canadian Artists Representation	Canadian Labour Congress
Canadian Association for Children with Learning Disabilities	Canadian Law Information Council
Canadian Association of Broadcasters	Canadian League of Composers
Canadian Association of University Teachers (CAUT)	Canadian Library Association
Canadian Authors Association	Canadian Motorola Electronics Co.
Canadian Broadcasting Corporation	Canadian Museums Association
Canadian Cable Television Association (CCTA)	Canadian Music Centre

Canadian Music Publishers Association	Federation des Auteurs et des Artistes du Canada
Canadian Radio-Television Commission	Federick, T.L., Don Mills
Canadian Record Industry Association (CRIA)	Finance, Department of
Canadian Record Manufacturer's Association	Grey Country Board of Education
Canadian School Trustees Association	Health and Welfare Canada, Department of
Canadian Teachers Federation	Heritage Canada
CJJC Radio, Langley	Indian & Northern Affairs, Department of
Communications, Department of	Industry Trade and Commerce, Department of
Composers, Authors and Publishers Association of Canada	Information Canada
Computer Services Bureau	International Association for the Protection of Industrial Property (AIPPI)
Conseil Supérieur du Livre	Labour Canada
Crilley, C.J., Montreal	Law Reform Commission
Defence Research Board	Library of Parliament
Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston	MacMillan Co. of Canada Ltd.
Duthie, W., Vancouver	Manitoba Department of Education
Educational Media Association of Canada	Manitoulin Secondary School
Educational Media Distributors Association of Canada	Manpower and Immigration, Department of
Elliott, W.D., West Bay	Meckler, Frances, Saskatchewan
Energy Mines and Resources, Department of	McIntyre, S., Vancouver
Environment, Department of the	Ministry of Industry & Commerce, Province of Saskatchewan
External Affairs, Department of	Montreal Informals
	Motion Picture Association of America, Inc.
	National Arts Centre
	National Defence, Department of

National Design Council	Summerlea Music Ltd.
National Film Board of Canada	Statistics Canada
National Gallery of Canada	Supply & Services Canada, Department of
National Library	Toronto Public Library
National Museums of Canada	Toronto Star Limited
National Research Council of Canada	Toronto University Library
Ontario Universities' Television Council	Transport, Ministry of
Payerle, G., Vancouver	Veterans Affairs, Department of
Post Office Department	Union des Artistes
Professional Artists of Canada	University of B.C. Library
Professional Photographers of Canada, Inc.	University of Toronto Press
Public Archives	Woodcock, G., Vancouver
Public Works, Department of	
Regional Economic Expansion, Department of	
Revenue Canada	
Royal Canadian Legion	
Science and Technology, Minister of State for	
Schroeder, A., Vancouver	
Secretary of State, Department of	
Société Canadienne-Française de Protection du Droit d'Auteur	
Société des Auteurs et Compositeurs du Québec	
Smith, Jean-Pierre, Montreal	
Song In Your Heart Publishing Limited	
Sound Recording Licences (SRL) Ltd.	

## APPENDIX II

METHODOLOGY FOR INDUSTRY SIZE ESTIMATESSIC 286 - Commercial Printing

This includes establishments primarily engaged in the production of commercial printing, regardless of the process.

The total contribution of this SIC is \$385.5 million. Of this, it is estimated that about 50% or 192.5 million could be allocated to industries which exploit copyright. The rationale for using 50% of this SIC was that only about half of the industry comprising this SIC depends on the exploitation of copyright. An identical assumption was made for the US study.

SIC 287 - Platemaking Typesetting and Trade Bindery Industry

This includes establishments primarily engaged in providing specialized services to the printing and publishing trades. The fraction of this SIC relating to copyright is estimated at 20% of the total for this SIC. This amounts to 12.6 million.

SIC 288-289 - Publishing and Printing (289) and Published Only (288)

288 Publishing Only - includes establishments primarily engaged in publishing only and which do no printing. Publishing includes the publishing of books, newspapers, periodicals, almanacs, maps, guides and similar products.

289 Publishing and Printing - includes establishments primarily engaged in both publishing and printing.

The total contribution of these two industries was \$492.3 million. They are considered to be entirely of a copyright nature.

SIC 3932 - Toys and Games Manufacturers

This industry consists of firms primarily engaged in the manufacture of all kinds of toys. It is estimated that no more than 10% of this SIC relates to industries which exploit copyright. This represents a contribution of \$3.4 million in 1971.

SIC 397 - Signs and Displays Industry

Since this SIC includes such items as mannequins, parts of the body etc, as well as signs, only a fraction of it was included in the estimate. An estimate of 40% was arrived at by noting that 40% of the value of shipments for that SIC originates in the signs industry - all of which is considered to be related to copyright. This implies that \$17 million may be allocated to copyright related industries.

SIC 3994 - Sound Recordings and Musical Instrument Manufacturers

Since no estimate of the contribution that sound recording makes to this SIC was available, the proportion of value of shipments was used as a proxy. This amounted to 85% of the total for this SIC and the contribution of sound recording to the GDP was therefore estimated to be \$19 million.

SIC 543 - Radio and Television Broadcasting

This represents all radio and television broadcasting, including closed circuit broadcasts. The entire SIC is regarded as a copyright industry in the context of our definition. The contribution of this SIC to the real domestic product was therefore \$336.4 million.

SIC 691 - Book and Stationery Stores

Although this SIC includes stationery stores, CANSIM<sup>1</sup> is able to provide a finer breakdown to overcome this problem. For the purposes of the present calculation the CANSIM base gives the contribution of bookstores only to the GDP. This amounts to \$29 million.

SIC 699 - Retail Stores

This SIC includes a number of types of retail establishment which are not elsewhere classified (n.e.s.). Since no estimate of value added was available for these stores, sales was used as a proxy for estimating its contribution to GDP. Thus 12% of the total annual retail sales of the complete group of retail stores originates from a sub group of retail stores called "all other" stores. This "all other" group includes: luggage, tobacco, sporting goods, book stores, florists, novelty shops, music stores, record stores, opticians, and boats, motors and accessories. Since the contribution of SIC-699 to the GDP was \$596.6 million, 12% of this (\$71 million) may be allocated to the "all other" group. Since it was estimated from the calculation for SIC-691 that book stores contribute \$29 million to the GDP, \$41 million remains unexplained. From the group definitions above, it was estimated that 50% of the remainder could be allocated to the copyright industries. The net contribution of SIC 699 was therefore \$20.5 million.

SIC 807 - Libraries, Museums and Other Repositories

The total contribution of SIC 807 to the 1971 GDP was \$89.5 million. Since only zoological and botanical gardens do not relate to copyright, it was estimated that 80% of this SIC's contribution to the 1971 GDP originated with industries relating to copyright. This amounts to \$71.6 million.

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1. Canadian Socio-Economic Information Management System (maintained by Statistics Canada).

SIC 841 - Motion Picture Theatres

The total contribution of this SIC to the GDP was \$70.4 million. This industry conforms to the aforementioned definition of a copyright industry and was therefore taken in its entirety.

SIC 842 - Motion Picture Production and Distribution

This SIC contributed \$48.9 million to the GDP in 1971.

SIC 845 - Theatrical and Other Staged Entertainment Services

This group contributed \$19 million to the 1971 GDP.

SIC 849 - Miscellaneous Amusement and Recreation Services

The only importance of this SIC is that it includes exhibition and juke box operators. Of the total of \$121 million which this SIC contributed to the 1971 GDP, an arbitrary 10% or 12.1 million is assigned to copyright industries.

SIC 862 - Advertising Services

Includes establishments primarily engaged in placing advertising in various types of media and most other common types such as advertising on subway cars, billboards, etc.

As with the corresponding US study (Reference 1), this group is taken in its entirety. The contribution is therefore \$142.5 million.

SIC 863 - Offices of Architects

This includes establishments engaged in the planning and designing of buildings and structures regardless of size, form, or function.

This SIC was taken in its entirety for a contribution of 74.6 million.

SIC 869 - Miscellaneous Services to Business Management

This SIC includes establishments primarily engaged in providing services to business management which are not included elsewhere. Some of these depend on the exploitation of copyright, including address list services, greeting card designing, opinion polls and other surveys, etc. It is estimated that approximately 45% of this group originates with copyright. This amounts to 75.3 million.

SIC 893 - Photographic Services n.e.s.

This SIC includes establishments primarily engaged in portrait and commercial photography, film developing and print processing of films.

As a whole, SIC 893 contributed \$40.6 million to the GDP. The complete group was regarded as being of a copyright nature.

## APPENDIX III

LIST OF COMMODITIES INCLUDED IN TABLE 3CLASS1 - Books:

M	Religious books and pamphlets	893-04
	Books pub. by foreign govt.	893-25
	Dictionaries	893-29
	Books and pamphlets n.e.s. exc english	893-41
	Novels and works of fiction n.e.s.	893-45
	Books and pamphlets n.e.s.	893-49
	Children's picture books	894-90
X	Books and pamphlets	893-99

2 - Newspapers and periodicals:

M	Newspaper supplements sections	891-04
	Newspapers unbound n.e.s.	891-08
	Magazines and periodicals n.e.s.	891-29
X	Newspapers	891-09
	Magazines and periodicals	891-19

3 - Music printed M

894-40

4 - Printed matter n.e.s.

M	Greeting cards	894-24
	Pictorial post cards	894-32
	Globes geographic topographic	894-03
	Charts and maps	894-09
	Picture reproduction n.e.s.	894-39
	Blueprints, plans and designs	895-24
	Decalcomania transfers	895-28
	Paper patterns, printed	895-36
	Advertising matter, printed n.e.s.	895-89
	Printed matter n.e.s.	895-99
X	Maps pictures, greeting cards, music	894-99
	Advertising matter, printed n.e.s.	895-89
	Printed matter, n.e.s.	895-99

5 - Films

M and X	Motion picture film, sold, exposed	918-13
	Photo film and plates, sold, exposed	918-39

6 - Phonograph records

M and X 637-90

7 - Video tape

M 634-77

8 - Magnetic tape n.e.s.

M 634-79

9 - Photographs

M

894-17

10 - Works of arts

X

946-29

11 - Drawings, etchings & engraving, original

M

946-04

12 - Paintings and pastels, made by hand

M

946-08

13 - Sculptures and statues, original

M

946-20

- a) From 1966 to now, 893-33 and 893-37 have been dispersed between these 3.
- b) 890-39 (1965-1972)  
893-99 (1973, → )
- c) 890-29 (1965-1972)  
891-99 (1973)  
891-09  
891-19 } (1974, → )
- d) From 1970, a part of 895-99 is now included in 895-89.
- e) 910-85  
910-89  
918-13  
918-39 } 1965-72  
(1973, → )
- f) up to 1970, computer tape is included.

Source: DBS 65-004  
 Export by commodities Dec 65, 66, ... 75

DBS 65-007  
 Import by commodities Dec 65, 66, ... 75





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